Petition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. .....

ROBERT BRACHE and EDNA FRANZA,

Petitioners,

against

COUNTY OF WESTCHESTER, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether the local "drug paraphernalia" ordinance is facially vague in violation of the due process clause of the Fourteenth Amendment because the ordinance presents an unacceptable risk of arbitrary and discriminatory enforcement?

2. Whether Petitioners' engaging in limited conduct clearly prohibited by the local ordinance does not preclude standing by the same Petitioners to challenge the facial vagueness of the ordinance as to the overwhelming majority of their conduct to which the ordinance may not validly be applied?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Gerald B. Lefcourt, on behalf of Petitioners, Robert Brache and Edna Franza, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on the 18th day of August, 1981, reversing the order of the District Court.

Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported at 507 F.Supp. 566 (S.D.N.Y. 1981) and a copy thereof is appended to this Petition as Appendix B. The opinion of the Court of Appeals for the Second Circuit, reversing the District Court, August 18, 1981, is reported at 658 F.2d 47 (2d Cir. 1981) and a copy thereof is appended to this Petition as Appendix A.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered August 18, 1981, and a copy thereof is appended to this Petition as Appendix C. An order denying Petitioners' Petition for Rehearing with suggestion for rehearing *en banc* was entered October 22, 1981, and a copy thereof is appended to this Petition as Appendix D. An order by the Court of Appeals granting Petitioners a stay of the court's mandate pending application for Writ of Certiorari was entered October 26, 1981 and a copy thereof is appended to this Petition as Appendix E.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes, Federal Rules and Regulations Involved

The Fourteenth Amendment to the United States Constitution states, in pertinent part:

> Section 1: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law."

Article IX of the Westchester County Consumer Protection Code, entitled "Sale and Display of Drug Accessories," is reprinted in its entirety as Appendix F.

Statement of the Case

A. The Facts

On or about May 29, 1980, the Westchester County legislature amended the Westchester Consumer Protection Code by adding a new Article IX entitled "Sale and Display of Drug Accessories." The ordinance provides criminal misdemeanor penalties for its violation, as stated in Section 863.233: "It shall be a violation of this code for any merchant or other person to knowingly sell, offer for sale, or display any cocaine spoon, marijuana pipe, hashish pipe, or any other drug-related paraphernalia."

"Drug-paraphernalia" is defined in Section 863.222 as anything "used, intended for use, or designed for use" in the creation, distribution, or utilization of a controlled substance. A lengthy non-exhaustive list of such items is provided, followed by fourteen factors which are among those authorities "should consider" "[i]n determining whether an item is drug paraphernalia."[1]

The ordinance was due to take effect on or about July 28, 1980, but Petitioners sought issuance of a temporary restraining order by the Federal District Court for the Southern District of New York, claiming, *inter alia*, the ordinance was unconstitutionally vague in violation of the Fourteenth Amendment to the United States Constitution. Judge Charles S. Haight, Jr. issued the temporary re-

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[1] The full text of the ordinance is attached as Appendix F.

straining order July 24, 1980 and, with Respondents' consent, subsequently consolidated Petitioners' request for a preliminary injunction against the ordinance's enforcement with the trial on the merits of the ordinance's constitutionality.

The trial commenced September 8, 1980 and included testimony by Petitioners as to their businesses and their contention that the ordinance failed to provide constitutionally adequate guidance either to the Petitioners in making their retail decisions or to the police in enforcing the enactment's proscriptions. Experts in the pipe and cigarette rolling papers industries discussed the design characteristics of their products, and the ordinance's possible application thereto. "Undercover agents" also testified, as they recounted their purchases from Petitioners' stores, and the Westchester County Deputy Commissioner of Public Safety provided insight into how his employees could be expected to enforce the ordinance. Additionally, testimony was provided by Dr. Norman Zinberg, clinical professor of psychiatry at Harvard Medical School, who stated his expert opinion that the Westchester County ordinance would not have a positive impact on the drug abuse problem.

During the course of Petitioners' testimony, each admitted that certain items introduced as exhibits were unquestionably marketed for use with controlled substances and there was no doubt these products constituted "drug paraphernalia" by any definition (so-called "single use" items).[2] However, Petitioners noted that the vast majority of exhibits had dual or multiple purposes and/or uses, and neither Petitioner felt certain whether or under

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[2] Brache: Tr. 100, 116 [Marijuana testing kit], 123, 184 [Marygin]; Franza: Tr. 340, 392 [Marygin], 341 [testing kits], 341, 361 [Free-base kits], 393 [Acrylic bongs]. (Tr. refers to the trial transcript).

what circumstances such items might be lawfully sold or offered for sale.[3]

Dan Good, called by Petitioners and qualified as a pipe expert, testified that neither material of composition (Tr. 539-40, 562-63), nor bowl size (Tr. 566, 562-63), nor the presence or absence of a chamber (Tr. 550) are determinative of the substance smoked. Rather, he stated, bowl size is a function of various factors including the size of the individual, gender, country of origin, length of smoke desired, and the experience of the smoker (Tr. 544-45), all factors unrelated to the substance smoked.

Respondents' pipe expert, Mark Kilik, endorsed parts of Good's testimony while challenging others. His major point was that certain methods of pipe construction are preferable to others for tobacco smoking, although he at no time stated that any particular pipe could not be used with tobacco. Thus, Kilik would not recommend for tobacco smokers pipes without mouthpieces (Tr. 1042) or water pipes (Tr. 1043) or pipes made from wood of inferior quality (Tr. 1043) or pipes with small bowls (Tr. 1049).

With regard to bowl size, Kilik said he would not recommend pipes with bowls smaller than one-half inch in interior diameter (Tr. 1094). Additionally, he does not believe pipe screens are generally useful in tobacco smoking, although he sells them in his store (Tr. 1081).

Richard Reedman, Petitioners' witness and Vice President and General Manager of Rizla Products U.S., Inc. and Robert Burton Associates, companies which have been

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[3] Brache: Tr. 14, 15, 90 [Pipes], 16 [Clips], 23 [Rolling Papers], 45, 46, 90 [Scales], 31, 95 [Spoons]; Franza: Tr. 386 [Pipes], 387 [Clips], 388 [Rolling papers], 388 [Cases], 389 [Cigarette holders], 389 [Jewelry], 390 [Mirrors], 391 [Inhalation devices], 391-92 [Strainers], 394 [Hookahs], 395 [Vials], 395-96 [Reading matter].

distributing cigarette rolling papers since 1796 (Tr. 251-52, 254), testified that between three and four million persons in the United States roll their own cigarettes (Tr. 260). He explained that cost, moisture content, and image often motivate such a choice (Tr. 276). Reedman also noted there is nothing unique about any particular type of rolling paper which makes it any more or less useful for rolling tobacco as opposed to rolling marijuana. Indeed, papers are in fact used for such varied purposes as cleaning glasses or camera lenses, or even for hair care (Tr. 277).

Aside from Petitioners' inability to discern which of their merchandise fell within the description of "drug paraphernalia," another key issue in Petitioners' vagueness challenge was the prospect for selective enforcement of the ordinance. Testimony by law enforcement officials intimately involved in both the preparation of Respondents' case as well as any subsequent enforcement that might occur demonstrated the impossibility of their determining, according to the ordinance's standards, what indeed constituted "drug paraphernalia." They could neither articulate any objective standards for recognizing such items (either "single-use" or "multi-use"), nor pinpoint the degree of culpability or involvement necessary on a store owner's part in order to precipitate a violation of the ordinance. Such confusion has become commonplace in "drug paraphernalia" law trial testimony. See *infra*, at 15-16 and n.11.

Inspector Richard Linkowski of the County's Department of Consumer Affairs (and one of the "undercover" buyers), when asked no less than 36 times whether particular items were drug paraphernalia as that term is defined by the Westchester ordinance, repeatedly responded, "I wouldn't be sure."[4]

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[4] Tr. 699, 700, 701, 704, 705, 707, 708, 709, 710, 712, 713, 714, 717, 717-a, 718, 719, 720, 723, 726, 742.

Also testifying as to the contemplated enforcement procedure was Karl Fulgenzi, the County's Deputy Commissioner of Public Safety, Head of the Police Division, and a 32-year veteran of the Westchester Parkway Police Department. Commissioner Fulgenzi is responsible for providing expert assistance to the 38 or 39 different municipal police departments in Westchester County (Tr. 749-50, 752, 756), and conceded that all police officers in the various departments would have authority to enforce the ordinance, and that from the wording of the ordinance itself, officers could reasonably disagree as to whether or not sale or display of a given item constituted a violation[5] (Tr. 840-41).

While Commissioner Fulgenzi did identify a few exhibits as being, in his opinion, drug paraphernalia regardless of the circumstances under which they were sold or displayed,[6] he equivocated as to the legality of the display or sale of most of the exhibits about which he was asked to comment. He said the propriety of most displays or sales would depend on various surrounding circumstances, such as the proximity of the product to "single-use" and/or

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[5] The following colloquy makes this point quite clearly:

"The Court: Well, Mr. Lefcourt's last question was not whether or not policemen occasionally make a mistake. Of course they do. Everyone does. District judges do. His question was, would it not be possible, under the phrasing of this ordinance for two separate police officers to reasonably disagree between themselves as to whether or not the factors indicate drug paraphernalia or not.

"The Witness: Absolutely, yes, they could reasonably disagree.

"The Court: Do you think such a disagreement between police officers could arise from the wording of the ordinance?

"The Witness: Exactly, yes, very much so." Tr. 840-41.

[6] Certain small bowl pipes (Tr. 768-69, 811, 814), pipes containing screens (Tr. 802), a marijuana testing kit (Tr. 911-12) and chillums (Tr. 913-16).

"multi-use" items, the density of display of only multi-use items, and the "the administration of the particular department and how they educate their personnel to make sure such enforcement is done properly" (Tr. 845-47, 892). In fact, the Commissioner noted that he himself would have to consult an expert to aid in deciding if an item fell within the ordinance's ambit (Tr. 816).

For example, Commissioner Fulgenzi explained, a pipe might be considered drug paraphernalia in a certain kind of shop or if offered specifically for use in smoking marijuana, but not if it were displayed along with other pipes in a pipe or hardware store (Tr. 768-71, 832). Similarly, a water pipe would be legal if sold along with other pipes and tobacco, but illegal if displayed together with other "paraphernalia items" (Tr. 833-34, 839). And again, depending on whether a scale was sold in a jewelry or hardware store as opposed to a novelty or gift store, the same weighing device might or might not subject the seller to arrest and prosecution (Tr. 842-45). Similar considerations apply with regard to cigarette rolling paper (Tr. 860), mirrors (Tr. 865-67), containers (Tr. 875-78), strainers (Tr. 875-78), cigarette lighters and certain types of jewelry useful for inhaling cocaine (Tr. 878-79) and razor blades (Tr. 883).

Under the Commissioner's reading of the ordinance, a novelty or gift shop might risk prosecution by some police officers merely by displaying two such dual- or multi-use products together (*e.g.*, a pipe and a scale), while he personally would require a somewhat greater concentration of items before he would pursue such a store owner (Tr. 845-47). Thus, a store could stock rolling papers, tobacco, pipes, and a scale, so long as it was not sold in response to a request for a drug-weighing device, according to the Commissioner (Tr. 889). If the proprietor added jewelry cases, he would still be all right, but the addition of water pipes would put him "dangerously close" to being in violation, particularly if all the items were in one part of the

store (Tr. 889-91). If a book section were added, containing 100 titles of which two described how to grow or use controlled substances, the Commissioner would definitely consider the owner in violation of the ordinance (Tr. 895). Even if such items were sold on different floors at a large department store, the proprietor and sales personnel would be subject to prosecution if it could be established that the merchandise was interrelated (Tr. 904-05).

B. The Opinion of the District Court

After digesting the voluminous testimony and exhibits offered at trial, the District Court in a January 28, 1981 opinion held Westchester County's "Drug Paraphernalia" ordinance "impermissibly vague, and consequently in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution." *Brache* v. *County of Westchester*, 507 F.Supp. 566, 581 (S.D.N.Y. 1981) (and at 48a). The District Court decided it would scrutinize the ordinance's constitutionality "on its face" rather than " applied," *Id.* at 573 (and at 31a), and invoked the principles of vagueness law propounded in *Greyned* v. *Rockford*, 408 U.S. 104, 108-09 (1972). The District Court did not make an "as applied" determination of the ordinance's constitutionality, but did note that "both plaintiffs were knowingly selling certain items which unquestionably constituted 'drug paraphernalia' to drug users; and that the Westchester ordinance would put them on notice, in respect of at least those items, that this was illegal." 507 F.Supp. at 573 (and at 29a).

Employing the *Greyned* analysis, the District Court held the ordinance's definitional section was sufficiently precise to pass constitutional muster, in regard to whether the

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[1] The full text of Judge Haight's opinion is reprinted as Appendix B. The notation (and at a) refers to the Appendix to this Petition.

ordinance gave those subject to enforcement fair warning of what was prohibited, thus clearing one hurdle involved in the *Grayned* doctrine. 507 F.Supp. at 577 (and at 39a).

The ordinance failed, however, to satisfy the other considerations mandated by *Grayned*. The District Court ruled that "without the requirement [in the ordinance] that the seller know the item was to be used with drugs, an unacceptable risk of arbitrary and discriminatory enforcement arises." *Id.* at 578 (and at 41a). This risk, the court declared, "implicates the second, and discrete, concern expressed in *Grayned, supra:* that 'if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.' 408 U.S. at 108."

The dangers attendant to the lack of sufficient standards was found by the court to be amply demonstrated by the testimony of Deputy Commissioner Fulgenzi, who manifested nothing short of complete uncertainty regarding the manner in which the ordinance would be enforced. 507 F.Supp. at 579-80 & n.9 (and at 42a).

This uncertainty raised the spectre of arbitrary and discriminatory enforcement amounting to a due process violation: "That the present Ordinance suffers from that constitutional defect emerges clearly from the record." 507 F.2d at 580 (and at 45a).*

C. The Opinion of the Court of Appeals

The United States Court of Appeals for the Second Circuit reversed the District Court August 18, 1981, concluding, "since the ordinance may constituitonally be applied to prohibit the plainitffs' sale of certain items clearly within the ordinance's definition of 'drug paraphernalia,'

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* Therefore, the District Court found the ordinance unconstitutionally vague in violation of the Fourteenth Amendment and issued a permanent injunction against the ordinance's enforcement.

the District Court should have refrained from adjudicating the validity of the Ordinance as it may apply to their sale of other items." *Brache* v. *County of Westchester*, 658 F.2d 47, 49 (2nd Cir. 1981) (and at 3a).[8]

The Court of Appeals claimed the District Court rejected Petitioners' facial attack by finding the existence of a "core group" of merchandise about which the ordinance gave fair notice to Petitioners. 658 F.2d at 51 (and at 9a). Thus, the court continued, "This valid application of the ordinance defeats the plaintiffs' facial challenge, regardless of the possibility that vagueness objections might be encountered if the ordinance is applied to their sale of multi-use items." 658 F.2d at 51-52 (and at 9a).

At this point the Court of Appeals faced a question it noted "does not appear to have been posed precisely in any case decided by the Supreme Court." 658 F.2d at 52 (and at 9a):

> "[W]hether a district court, having properly rejected a facial challenge to a local ordinance because the ordinance would be valid as applied to one activity in which the plaintiff is engaged, should proceed to adjudicate the merits of a claim that the ordinance would be unconstitutionally vague if applied to a second activity currently engaged in by the same plaintiff." *Id.*

Using the standing principles enunciated in *United States* v. *Raines*, 362 U.S. 17, 21 (1960), the Court of Appeals answered the proposition in the negative. While the court, in applying *Raines, supra*, conceded that the prohibition on asserting the rights of third parties announced therein could not apply directly to the Petitioners,

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[8] The full text of the Court of Appeals' opinion is reprinted as Appendix C.

it held "the force of [*Raines's*] reasoning is fully applicable to their situation." 658 F.2d at 52, n.7 (and at 10a, n.7).

Petitioners' petition for rehearing with suggestion for rehearing *en banc* was denied October 16, 1981, and October 26, 1981, the Court of Appeals granted Petitioners a stay of its mandate pending this application for Writ of Certiorari.[9]

REASONS FOR GRANTING THE WRIT

Argument

Introduction

This case presents fundamental issues concerning the application of facial vagueness scrutiny to a local ordinance, and the requirements for standing to make a pre-enforcement constitutional challenge to a local ordinance, an issue the court below acknowledged, "does not appear to have been posed precisely in any case decided by the Supreme Court." *Brache, supra,* 658 F.2d at 52 (and at 9a).

In regard to vagueness, the Court of Appeals did not subject the ordinance to the second but indispensable test this Court prescribed in *Grayned* v. *Rockford, supra,* that of the dangers of arbitrary and selective enforcement. The panel also inaccurately characterized the foundation of the District Court's opinion, which emphasized the impossibility of law enforcement officers getting sufficiently clear guidance from the intent required in the offense section, combined with the County's witnesses' definitions and understandings of what constitutes "drug paraphernalia".

In addition, the related vagueness issues precipitated by drug-paraphernalia laws have already been deemed

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[9] The orders denying and granting the respective motions are appended as Appendices D and E.

significant enough to warrant a hearing before this Court. *The Flipside, Hoffman Estates, Inc.* v. *Village of Hoffman Estate,* 639 F.2d 373 (7th Cir. 1981), prob. juris. noted —— U.S. ——, 101 S.Ct. 3028 (1981). Oral argument before this Court will be heard December 9 in this case litigating the constitutionality of a local drug paraphernalia law. A petition for Writ of Certiorari for a matter presenting another challenge to a drug paraphernalia enactment was circulated among the Justices October 30. *The Casbah, Inc.* v. *Thone,* 651 F.2d 551 (8th Cir. 1981). The vagueness issues raised in the instant case are quite similar in nature and merit the scrutiny deemed proper in *Hoffman Estates.*

The standing issue, unique to this case, concerns the application by the court below of the standing limitations established in *United States* v. *Raines, supra,* to Petitioners, even though Petitioners themselves, and not third parties, conduct the activities under which they challenge the ordinance. Not only is this vital issue one of first impression for this Court, but the opinion below is contrary to the conclusions reached by the five other Circuit Courts of Appeal that have recently faced the question in regard to suits challenging "drug paraphernalia" laws.[10]

This Court should resolve the issues presented here in order to unify the law of the Circuit Courts of Appeal, in addition to correcting the misinterpretation and misapplication of authoritative Supreme Court doctrine in both instances.

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[10] *The Flipside, Hoffman Estates, supra; Record Revolution No. 6, Inc. v. City of Parma,* 638 F.2d 916 (6th Cir. 1980), vacated and remanded —— U.S. ——, 101 S.Ct. 2998 (1981) (on mootness grounds); *Florida Businessmen for Free Enterprise v. City of Hollywood,* 648 F.2d 956 (5th Cir. 1981) (noting likelihood of plaintiffs' success on the merits); *The Casbah, Inc. v. Thone,* 651 F.2d 551 (8th Cir. 1981); *Hejira Corp. v. MacFarlane,* No. 80-2062 —— F.2d —— (10th Cir. May 5, 1981).

The only court whose analysis was consistent with the Second Circuit's was the District Court in Michigan in *Tobacco Road v. City of Novi,* 490 F.Supp. 537 (E.D. Mich. 1979).

I. The local "drug paraphernalia" ordinance is facially vague in violation of the due process clause of the Fourteenth Amendment because the ordinance presents an unacceptable risk of arbitrary and discriminatory enforcement.

The Court of Appeals ruled that Petitioners' "facial attack failed on the merits when the District Court found that the ordinance has a core meaning that gives fair notice of its application to the sale of single-use items." 658 F.2d at 51 (and at 8a-9a). This proposition contains two defects. The first is that the holding that the Westchester statute provides "fair notice" of what is proscribed thereunder satisfies only one of the *two* requirements a statute must meet to survive a charge of facial vagueness. The Supreme Court in *Grayned, supra,* mandates that a determination must also be made whether the ordinance "provides explicit standards for those who apply them." 408 U.S. at 108. This second, essential inquiry is directed at the dangers of "arbitrary and discriminatory enforcement" of the law. *Id.*

In fact, it was this second prong of the *Grayned* vagueness doctrine under which the District Court found the ordinance constitutionally deficient. Yet, the Court of Appeals never addressed this crucial aspect of facial vagueness analysis, as was its duty under *Grayned.*

Thus, the language of the panel opinion notwithstanding, 658 F.2d at 51-52 (and at 9a), it was absolutely *not* Judge Haight's view that the ordinance failed to give Petitioners fair notice of what they could or could not sell; on the contrary, his Honor found (much to Petitioners' dismay) that the definitional language "used, intended for use, or designed for use" *was* clear. 507 F.Supp. at 577 (and at 39a). Rather, he explicitly found the ordinance unconstitutionally vague because its definition of the substantive offense (§ 863.223) omitted a require-

ment that the seller know the actual intended use of an item defined as paraphernalia. 507 F.Supp. at 578 (and at 41a). As Judge Haight stated, "[t]his implicates the second, and discrete, concern expressed in *Grayned, supra,* that 'if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.' 408 U.S. at 108." *Id.* "The primary constitutional deficiency," Judge Haight concluded, "is that without the requirement that the seller know the item was to be used with drugs, an unacceptable risk of arbitrary and discriminatory enforcement arises." *Id.*

The District Court was therefore correct in conducting a facial analysis of the ordinance (and in subsequently finding it unconstitutional under the standards of such an examination), as the ruling was based on a critical omission in the definitional language itself which raised "substantial constitutional questions [relating to] the ordinance in its entirety." 507 F.Supp. at 573 (and at 30a). Moreover, since Petitioners' action commenced before the ordinance took effect, the District Court accurately noted, "in the absence of 'a formal, factual development as to the actual practices of enforcement' . . . an insufficient basis exists for adjudicating validity as applied. *Hejira Corp.* v. *MacFarlane,* Crim. Action No. 80-F-824 (D. Colo., Sept. 15, 1980) (oral opinion at Tr. 9), [rev'd. on other grounds, No. 80-2062, —— F.2d —— (10th Cir. May, 5 1981)]." 507 F.Supp. at 573 (and at 30a).

Judge Haight's conclusion that the ordinance's language raised the spectre of arbitrary and discriminatory enforcement is well supported by the record. The rampant uncertainty in prospective enforcement of the ordinance, revealed in the testimony of Inspector Linkowski and Commissioner Fulgenzi, *supra* at 6-9, had the proper impact on the District Court. Noting the testimony by Commissioner Fulgenzi was "[v]irtually identical" to that given by law enforcement officials in *Record Revolution No. 6,*

Inc. v. *City of Parma*, 638 F.2d 916 (6th Cir. 1980),[11] vacated and remanded —— U.S. ——, 101 S.Ct. 2998 (1981) (on mootness grounds), the District Court found the Commissioner's testimony was "fairly paraphrased" in Petitioners' Post-Trial Memorandum, as follows:

> "He insisted time and time again that anyone displaying or selling a pipe with a screen is in violation of the Ordinance (Tr. 759, 761, 785-8, 802, 811, 824, 918, 920, 923), in stark contrast to Don Good's and Mark Kilik's [expert witnesses] testimony that screens were originally developed for use with tobacco and served as a cooling mechanism for any type of smoking agent, preventing the mixing of tobacco, tars, and saliva in the heel of the pipe (Tr. 546, 547, 1081). Curiously, he also testified that if *he* were to put a screen into a pipe he purchased, that pipe would not constitute paraphernalia (Tr. 922-24). He additionally said that anyone displaying plaintiffs' EG-11, an antique which has been and could be used as either a pipe or cigar holder, would in all circumstances be in violation of the Ordinance, and asserted that the Ordinance places the burden on the store owner to determine whether the items he sells are legal or illegal (Tr. 817-18). At one point, he simply said that one would have to consult an expert to determine whether a particular item could be lawfully sold (Tr. 816).

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[11] The Court of Appeals for the Sixth Circuit found the Parma, Ohio drug paraphernalia ordinance unconstitutionally vague and overbroad in violation of the First and Fourteenth Amendments to the United States Constitution. This Court vacated the decision on mootness grounds. Besides appearing in *Parma*, this type of law enforcement testimony is endemic to drug paraphernalia statute litigation. For example, see *Franza v. Carey*, 518 F.Supp. 324 (S.D.N.Y. 1981); *Magnani v. City of Ames*, 493 F.Supp. 1003 (S.D. Iowa 1980).

> Perhaps most revealing was Commissioner Fulgenzi's position that at some point a store becomes so saturated with "head shop" items that sale or display of virtually any dual-use or multi-use product would constitute a crime (Tr. 886-88).

507 F. Supp at 579 and n.9 (and at 42a-43a).

Because "uncertainties are inherent in [the ordinance's] terms," 507 F.Supp at 579 (and at 43a), in regard to enforcement guidelines and the intent provisions of § 863.223, the "core group" argument employed by the Court of Appeals, which constitutes the second infirmity in the panel's vagueness analysis, is irrelevant.

The ordinance does not so much as mention "single-use" items, nor does it in any way distinguish *any* items listed according to the range of their use, purpose or design. The ordinance fails to give enforcement authorities any consistent or accurate idea concerning what merchandise might be considered "single-use" in nature. The intent required by § 863.223 allows for arrest and prosecution for the sale and display of *any* drug paraphernalia, without first demanding a determination of the seller's state of mind. Discriminatory and arbitrary enforcement is, under these circumstances, not only a serious risk but a virtual certainty.

However, the Court of Appeals reversed the District Court because the former found there existed a "core group" of items which Petitioners sold that clearly constituted "drug paraphernalia". The panel reached this conclusion despite the fact that its opinion contained neither a single reference to the multifaceted definition of drug paraphernalia found in § 863.222 of the ordinance nor any inquiry whether the term "single-use item" itself adequately defines a "core group" in the context of the ordinance and Supreme Court precedent.

The proposition that the "single-use" items alleged or admitted at trial constitute a "core group" or were categorized as such by the ordinance or the District Court is defeated by the proper application of the appropriate Supreme Court doctrine to the ordinance, the trial record and the District Court opinion.

The definitional section of the Ordinance, § 863.222, contains fourteen subclasses of possible paraphernalia, and the twelfth of these subclasses contains 13 subdivisions. Almost without exception these various sub-definitions of paraphernalia relate to multi-use items, and their status as "drug paraphernalia" hinges upon whether the particular items are "used, intended for use or designed for use" with controlled substances. The ordinance does not enunciate *any* distinctions between "single" and "multi-use" items, nor do the terms appear anywhere in the ordinance. In fact, Section 863.222, which details the substantive offense, prohibits the knowing sale, offer for sale, or display of *"any cocaine spoon, marijuana pipe,* or *any other drug-related paraphernalia."* (Emphasis added). The only specified items in the section are unquestionably multi-use in nature, yet the Court of Appeals found the ordinance contained a "core meaning" in regard to its enforcement against "single-use" items.[12]

What the panel in effect did was invert traditional notions of vagueness scrutiny prescribed by the Supreme Court. Rather than determining whether the ordinance is clear with respect to the "core conduct" sought to be regulated, it seized upon certain fringe activity as a basis for denying Petitioners' challenge to the entire law.

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[12] The District Court opinion never characterized the proportionately miniscule number of "single-use" items as a "core group". (See notes 2, 6 and 13). As noted *infra*, at 17, the "core group" analysis was unnecessary once the District Court found that the danger of arbitrary and discriminatory enforcement permeated the entire ordinance.

We respectfully submit that the difficulty lies primarily with the panel's having looked to isolated fact situations to determine the ordinance's core clarity,[13] rather than looking to the words of the ordinance itself. This approach is directly contrary to that which the Supreme Court has advised should be taken: "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgressions." *Lanzetta* v. *State of New Jersey*, 306 U.S. 451, 453 (1939).

If the Court of Appeals had facially analyzed the ordinance in these terms—looking to the words of the law itself rather than to isolated "single-use" items which are paraphernalia under any definition—the erroneous result would not have been reached. Viewed in this perspective, the Supreme Court decisions cited by the Court of Appeals in discussing facial vagueness make sense. Thus it is quite true that facial vagueness exists only when the language in question "cannot be applied to any conduct," and when "no standard of conduct is specified at all." 658 F.2d at 50-51 (and at 7a). But the quoted language has *never* meant that if a court can pinpoint fringe con-

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[13] Even if the multifaceted definition of "drug paraphernalia" embodied in § 863.222 did have an isolatable core of "single-use" items, a conclusion Petitioners consider dubious at best, it would still be necessary to determine whether that "core" is itself facially clear. While the Court of Appeals neglected to make this necessary inquiry, the phrase "single-use item" is far from precise. In discerning this supposed "core group," the Court of Appeals relied on Petitioners' subjective opinions that a certain few items have only drug-related uses and therefore would be prohibited under any definition of paraphernalia. Yet in discussing which items would come within this classification, Petitioners could not agree among themselves, much less with the Respondents, what products had only drug-related uses. Additionally, Westchester County Police Commissioner Fulgenzi testified time and again that pipe screens were single-use items (Tr. 759, 761, 785-8, 802, 811, 824, 918, 920, 923); not only was this testimony disputed by Petitioners, but it was disputed by the Respondents' own pipe expert, Mark Kilik (Tr. 1081).

duct which would clearly be proscribed, then the ordinance is not facially vague.

For example, in *Connally* v. *General Const. Co.*, 269 U.S. 385 (1926), the Supreme Court held facially vague a statute which required the state to pay its employees at least the "current rate of wages in the locality." The vagueness of both the phrase "current rate of wages" and the term "locality" were the source of the Court's finding, but is there any doubt that this language could have been clearly applied if the state were paying half the wages of any private employer in the state?

Similarly, in *Lanzetta* v. *State of New Jersey, supra,* the Court found a New Jersey criminal statute "repugnant on its face" when it created a penalty for being a "gangster". In particular, the Court found the term "gang," contained within the definition of "gangster" facially vague and also found a lack of certainty in the phrase "known to be a member." As vague as the definition was, there would have been little uncertainty in applying it to such convicted gangsters as, say, Lucky Luciano or Al Capone.

The Court of Appeals' reasoning would validate the statutes in both *Connally* and *Lanzetta,* since each could be found to apply to certain conduct. The same is true of the vaguest of definitions, but such a tenuous connection cannot cure facial vagueness.

Thus the Court of Appeals' interpretation of facial vagueness is contrary to this Court's strictures, first in its failure to employ the second of the necessary two tests as required by *Grayned* v. *Rockford,* and then in its misapplication of the "core conduct" model as mapped out in *Connally* and *Lanzetta.* The District Court invoked the correct analysis and thereby properly recognized the ordinance's facial vagueness.

II. Petitioners engaging in limited conduct clearly prohibitied by the local ordinance does not preclude standing by the same Petitioners to challenge the facial vagueness of the ordinance as to the overwhelming majority of their conduct to which the ordinance may not validly be applied.

The Court of Appeals held that Petitioners' pre-enforcement sale of so-called "single-use" products precluded them from adjudicating the constitutionality of the ordinance as applied to the numerous multi-use items they also sell. We respectfully urge that this ruling involves the mistaken application to Petitioners of the rule as enunciated by the Supreme Court in *United States* v. *Raines, supra,* that persons cannot assert the rights of third parties.

This particular issue, as the Court of Appeals noted, has not been decided squarely by this Court. There also exists a conflict among the federal Circuit Courts of Appeals and District Courts regarding this issue. The Court of Appeals' decision in the instant case is not in concert with the other five Circuit Courts of Appeals that have faced this question. In fact, only one of the many courts that have heard the ever-growing challenges to recently enacted local and state drug paraphernalia laws agrees with the Second Circuit's position.[14]

The rule in *Raines, supra,* at 21, that "one to whom application of a statute is constitutional will not be heard to attack the Statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional," cannot be applied to Petitioners' situation. As the Court of Appeals conceded, "plaintiffs' situation differs" from

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[14] See note 10, *supra.*

that contemplated in *Raines*, because "plaintiffs in this case seek a ruling as to whether the challenged ordinance would be valid as applied to a category of conduct they are currently engaged in seling multi-use items." 658 F.2d at 52 (and at 10a).[15]

Yet the Court of Appeals decided the considerations underlying the *Raines* rule required its application to Petitioners. "[T]hese considerations," states the panel decision

> include the undesirability of unnecessary, premature, or unduly broad pronouncements on constitutional issues, the intrusiveness of a court's considering all the situations in which a law could possibly be applied, and the possibility of a limiting construction being placed on the law in the event an application of questionable validity was concretely presented.

Id. When carefully considered, however, the *Raines* rule and its fundamental bases were clearly not contemplated to bar standing to individuals in Petitioners' position.

Petitioners are not criminal defendants, and the Court of Appeals' attempt at making such an analogy falls short. A criminal action is initiated by the government and seeks to punish a person for a specific act of wrong-

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[15] The Court of Appeals' opinion also emphasizes that "[i]t would be a singularly inappropriate use of a court's equitable jurisdiction to grant relief to plaintiffs currently selling single-use items . . ., especially when the plaintiffs have shown no willingness to remove those items from their shelves." 658 F.2d at 54 (and at 14a). This concern is misplaced, as Petitioners were not breaking any law in selling single-use items throughout the pendency of this action, since the ordinance was not at any time in effect. In fact, Petitioner Brache affirmatively stated, "If there is something that is illegal in my shop, it would please me to take it out of my shop" (Tr. 244, *see also* Tr. 343). That is the precise purpose of Petitioners' action: to determine just what items were covered by the ordinance. No evidence exists to support the panel's charge that Petitioners indicated "no willingness" to remove any merchandise declared "illegal."

doing. Barring unusual circumstances, why should the criminal defendant be permitted to defend on the ground that the statute may in some other unrelated circumstance be wrongfully applied to him?

The instant case, by contrast, is a civil action initiated by persons who allege that they have been threatened with imminent illegal arrest and the unlawful deprivation of their property and livelihoods. Why should such an action be precluded because the court can hypothesize a situation when the plaintiff may be lawfully arrested *if* the ordinance becomes effective?

The Court of Appeals' opinion finds that the threat of arrest and prosecution for sale of multi-use items is actually speculative, since "we do not know whether Westchester will prosecute the plaintiffs for selling single-use items, or for seling multi-use items, or for selling both categories of items." 658 F.2d at 52-53 (and at 11a).[16] It thereby invokes the first consideration of *Raines* cited by the panel, the undesirability of rendering premature judgments.

The panel's premise is faulty in part because the nature of the ordinance at issue here is significantly different

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[16] Most respectfully, we cannot understand the panel's uncertainty in light of the record: 1) Petitioner Brache, in his affidavit filed with the complaint in this action, stated he was informed in no uncertain terms that he would have to close his *entire* smoking accessories section, which includes "many gift items that may or may not be considered drug paraphernalia" (JA-18); 2) The Ordinance on its face makes no distinction whatever between single and multi-use items and in fact refers primarily to the latter group; 3) Jerome Herlihy, Police Chief of Mt. Kisco, said he fully intended to enforce the law against "[t]hese people who sell the water-pipes and cocaine spoon," both of which are multi-use items (JA-26); and 4) Karl Fulgenzi, Deputy Commissioner of Public Safety in Westchester County, gave extensive testimony with respect to how the ordinance would be enforced, specifically as against multi-use products. *See* 507 F. Supp. at 579. ("JA" refers to the Joint Appendix submitted to the Court of Appeals).

from the statutes involved in *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), and *United States* v. *Raines*, *supra*, where the legislatures had clearly intended to prohibit, at least, certain conduct by certain persons, with a questionable area of activity surrounding these prohibitions. The Westchester County ordinance, like the Florida statute struck down in *Smith* v. *Cahoon*, 283 U.S. 553 (1931), provides no justification for a judicial interpretation which would apply the act only to items solely designed and used for controlled substances (just as Florida argued in vain that the transportation to be regulated would be limited to common carriers). The ordinance contains no hierarchy of proscribed paraphernalia to warrant classification of items as "hard-core" or otherwise, as noted *infra*, at 18. And since the ordinance has not taken effect, no evidence is available to show that enforcement would be limited to "clearly" prohibited materials. In fact, the trial evidence indicates enforcement would be limited only in that a select list of stores were so targeted by Inspector Linkowski (Tr. 683), whose definition of drug paraphernalia was the quintessential, "I know it when I see it" (Tr. 689).

Thus, the Court of Appeals' groundless hope that "the local prosecuting authorities will proceed initially with the case that encounters no constitutional infirmity," 658 F.2d at 53 (and at 12a) is not an adequate ground for abstention. Rather, it is in direct contrast wtih Supreme Court doctrine: "Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." *Baggett* v. *Bullitt*, 377 U.S. 360, 373 (1964). The Court in *Baggett* v. *Bullitt* went on to decline an invitation to abstain where abstention would result in piecemeal adjudication of innumerable factual situations. *Id.* at 378. What the Supreme Court declined to do is precisely what the Court of Appeals has suggested be done; the state courts will be called upon separately to interpret the ordinance as applied in dozens, if not hundreds, of discrete factual contexts.

Raines certainly was not meant to precipitate such a result, especially in a case in which not third parties, but Petitioners themselves engage in the activity under which they challenge the ordinance. The Court of Appeals admits the latter, and its invocation of the *Raines* rule to bar Petitioners' standing is an unwarranted and unintended extension of the rule's permissible scope. We ask the Court to accept jurisdiction of this case to resolve this question of first impression, and to reverse the judgment of the Court of Appeals, thereby reinstating the District Court's permanent injunction against the ordinance's enforcement.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

Dated: New York, New York
November 25, 1981

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• Joshua L. Dratel, an associate in my office, is a June, 1981 graduate of Harvard Law School recently passed the New York State Bar Examination and is awaiting admission to the Bar.

APPENDIX A, Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1496—September Term, 1980

(Argued June 3, 1981 Decided August 18, 1981)

Docket No. 81-7211

ROBERT BRACHE and EDNA FRANZA,

Plaintiffs-Appellees,

—v.—

COUNTY OF WESTCHESTER, ALFRED DELBELLO, KENNETH HALE, SAMUEL S. YASGUR, THOMAS DELANEY, JEROME HERLIHY and TERRENCE SHAMES,

Defendants,

COUNTY OF WESTCHESTER, ALFRED DELBELLO, KENNETH HALE, SAMUEL S. YASGUR, and THOMAS DELANEY,

Defendants-Appellants.

Before:

KAUFMAN and NEWMAN, *Circuit Judges,* and GAGLIARDI,* *District Judge.*

* The Honorable Lee P. Gagliardi of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A

Appeal from a judgment of the District Court for the Southern District of New York (Charles S. Haight, Jr., Judge), declaring a Westchester County ordinance prohibiting the sale of drug paraphernalia unconstitutionally vague and enjoining its enforcement. 507 F. Supp. 566, Reversed and remanded.

JANE BILUS GOULD, Senior Asst. County Atty., White Plains, N.Y. (Samuel S. Yasgur, Westchester County Atty., Jonathan Lovett, Deputy County Atty., White Plains, N.Y., on the brief), *for defendants-appellants.*

RICHARD WARE LEVITT, New York, N.Y. (Gerald B. Lefcourt, New York, N.Y.) on the brief, *for plaintiffs-appellees.*

NEWMAN, *Circuit Judge:*

In recent years several states and units of local government have enacted legislation to prohibit the sale of items used in connection with marijuana, cocaine, and other controlled substances. Many of the laws have encountered pre-enforcement challenges by merchants who claimed that the laws' definitions of "drug paraphernalia" were impermissibly vague in violation of the Due Process Clause of the Fourteenth Amendment.[1] Such challenges present

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[1] *See, e.g., The Casbah, Inc. v. Thone,* —— F.2d ——, No. 80-1925 (8th Cir. June 8, 1981); *Hejira Corp. v. MacFarlane,* —— F.2d ——, No. 80-2062 (10th Cir. May 5, 1981); *The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates,* 639 F.2d 373

(footnote continued on following page)

troublesome issues on the merits and difficult threshold issues concerning standing and the appropriateness of equitable relief. This appeal involves a pre-enforcement challenge by two merchants to the constitutionality of Westchester County's drug paraphernalia ordinance. The District Court for the Southern District of New York (Charles S. Haight, Jr., Judge) declared the ordinance void for vagueness and permanently enjoined its enforcement. *Brache* v. *County of Westchester,* 507 F. Supp. 566 (S.D.N.Y. 1981). We conclude that since the ordinance may constitutionally be applied to prohibit the plaintiffs' sale of certain items clearly within the ordinance's definition of "drug paraphernalia," the District Court should have refrained from adjudicating the validity of the ordinance as it may apply to their sale of other items. We therefore reverse.

I.

In May 1980, the Westchester County Board of Legislators amended the County's Consumer Protection Code to include a new article IX entitled "Sale and Display of Drug Accessories." The ordinance makes it a misdemeanor for "any merchant or other person to knowingly sell, offer for sale, or display any cocaine spoon, marijuana pipe, hashish pipe, or any other drug-related paraphernalia." The ordinance defines "drug paraphernalia" as "all equipment, products and materials of any

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(7th Cir. 1981), *prob. juris. noted,* —— U.S. ——, 49 U.S.L.W. 3893, No. 80-1681 (June 1, 1981); *Record Revolution No. 6, Inc. v. City of Parma,* 638 F.2d 916 (6th Cir. 1980), *vacated and remanded,* —— U.S. ——, 49 U.S.L.W. 3877, No. 80-1507(May 26, 1981); *High Ol'Times, Inc. v. Busbee* 621 F2d 135 (5th Cir. 1980); *Geiger v. City of Eagan,* 618 F.2d 26 (8th Cir. 1980).

kind which are used, intended for use, or desi[gn]ed for use in . . . growing, . . . preparing, testing, . . . [or] ingesting . . . a controlled substance," including, but not limited to, more than a dozen specified items ranging from drug test kits to "ice pipes or chillers."[2]

Plaintiffs Brache and Franza each own and operate a store in Westchester County. Each store includes a "smoking accessories" section stocked with some items that have no use other than to test or ingest controlled substances (*e.g.*, "marijuana test kits," "free-base cocaine kits," and "toke-o-matic 20 bong hitters"), as well as other items that could be used for either lawful or unlawful purposes (*e.g.*, pipes, spoons, and rolling papers). Shortly before the Westchester ordinance was to take effect, the plaintiffs brought this suit for declaratory and injunctive relief under 42 U.S.C. § 1983 (1976) against the County and the County officials responsible for enforcing the ordinance. The plaintiffs alleged that the ordinance is unconstitutionally vague on its face in that it fails to give fair notice of what constitutes "drug paraphernalia." To establish the existence of a live controversy with the defendants sufficient to satisfy the jurisdictional prerequisites of Article III of the Constitution, Brache alleged that he had been advised by local law enforcement officials that he would have to close his "smoking accessories" section once the ordinance went into effect, and Franza alleged that persons she recognized as plainclothes investigators had visited her "smoking accessories" section and asked questions about the uses of various items. Franza also alleged that her store had been named in the local press as being on the County's list of stores selling items that the ordinance would prohibit.

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[2] The full text of the ordinance is set forth in the District Court's opinion. 507 F. Supp. at 567-70.

Appendix A

Upon receipt of the plaintiffs' papers, the District Court entered a temporary restraining order enjoining enforcement of the ordinance pending an evidentiary hearing on the plaintiffs' motion for a preliminary injunction.[3] At the hearing, which was consolidated with a trial on the merits, the plaintiffs admitted that at least some of the items they were selling could be used only for preparing, testing, or ingesting drugs and that these single-use items were plainly within the ordinance's definition of "drug paraphernalia."[4] On the basis of this testimony and other evidence, the District Court found that "both plaintiffs were knowingly selling certain items that unquestionably constituted 'drug paraphernalia' to drug users" and that "the Westchester ordinance would put them on notice, in respect of at least those items, that this was illegal." 507 F. Supp. at 573.

At that point both the defendants and the District Court encountered difficulty with the concepts of a challenge to a law on its face and a challenge to a law as applied. The defendants moved to dismiss the complaint, contending that since the ordinance could lawfully be applied to the plaintiffs' sale of single-use items, the plaintiffs lacked standing to challenge the validity of the ordinance "on its face." *Id.* The defendants relied on the

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[3] The life of the temporary restraining order was subsequently extended with the defendants' consent to maintain the status quo pending the District Court's entry of a final judgment. *See* 507 F. Supp. at 567.

[4] The plaintiffs initially testified that they did not know what any of their items might be used for, alleging that their only interest was in selling the items for profit. On cross-examination, however, they acknowledged that such items as "marijuana test kits," "free-base cocaine kits," and "coke-kits" have no realistic use other than to test or ingest controlled substances. The District Court rejected the plaintiffs' initial denials of knowledge as "unworthy of belief." 507 F. Supp. at 573.

rule that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines*, 362 U.S. 17, 21 (1960). The District Court responded that the validity of the ordinance as applied could not be determined for lack of a sufficient record concerning the defendants' "actual practices of enforcement" of the ordinance, and that a facial challenge was therefore appropriate. 507 F. Supp. at 573-74. By "facial challenge" the defendants and the Court appear to have meant a challenge to the ordinance as applied to all the plaintiffs' multi-use items, *i.e.*, items that could be used either in connection with drugs or for lawful activities such as tobacco smoking.[5] Proceeding to engage in what it described as "facial analysis," the District Court examined the validity of the ordinance in light of "the full range of commercial activity that the ordinance forbids," and concluded that the ordinance provides an inadequate

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[5] In determining that the plaintiffs have standing to adjudicate the validity of the ordinance in its possible application to their sale of multi-use items, the District Court relied on the First Circuit's analysis of the standing question in *Goguen v. Smith*, 471 F.2d 88, 92 (1st Cir. 1972), *aff'd*, 415 U.S. 566 (1974), a habeas corpus case allowing vagueness and overbreadth challenges to a state flag-misuse statute by a defendant convicted of violating the statute by sewing a flag to the seat of his jeans. In affirming the First Circuit, the Supreme Court majority upheld the challenge to the vagueness of the statute, concluding that the statute could not lawfully be applied even to the defendant's allegedly "hard-core" conduct. *See* 415 U.S. at 577-78. The concurring justices rejected the vagueness challenge because the statute had an understandable core meaning; they nevertheless agreed to reverse the conviction because the statute violated the defendant's First Amendment rights. No member of the Court gave any endorsement to the First Circuit's analysis of standing, which had permitted the defendant to assert the invalidity of the ordinance as applied to conduct "closely related" to his own. 471 F.2d at 92.

basis for either a retailer or a law enforcer to determine which multi-use items fall within its coverage. *Id.* at 574-81. The Court declared the ordinance "impermissibly vague" and permanently enjoined its enforcement. *Id.* at 581.

II.

Analysis of the standing issues posed by the plaintiffs' pre-enforcement challenge will be clarified by first considering the difference between facial and as-applied challenges when raised as defenses to a criminal prosecution. A statute is unconstitutionally vague on its face only when it cannot validly be applied to any conduct. *United States v. Powell,* 423 U.S. 87, 92 (1975); *Parker v. Levy,* 417 U.S. 733, 755 (1974); *Smith v. Goguen,* 415 U.S. 566, 583 (1974) (White, J., concurring in the judgment, with whom Burger, C.J., and Blakmun and Rehnquist, JJ., concurred in rejecting vagueness challenge); *United States v. Vuitch* 402 U.S. 62, 74 (1971) (White, J., concurring); *Coates v. City of Cincinnati,* 402 U.S. 611, 617 (1971) (White, J., dissenting). Facial vagueness occurs when a statute is expressed in terms of such generality that "no standard of conduct is specified at all." *Coates v. City of Cincinnati, supra,* 402 U.S. at 614. "Such a provision simply has *no* core." *Smith v. Goguen, supra,* 415 U.S. at 578 (emphasis in original). On the other hand, if a statute has a core meaning that can reasonably be understood, then it may validly be applied to conduct within the core meaning, and the possibility of such a valid application necessarily means that the statute is not vague on its face. Moreover, under the traditional rule of standing expressed in *Raines v. United States, supra,* a defendant to whom a statute may validly be applied may not avoid conviction by contending that the statute would be unconstitutional if applied to other persons or other situa-

tions. *See United States v. Powell, supra; United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963); *Williams v. United States*, 341 U.S. 97, 100-02 (1951); *Robinson v. United States*, 324 U.S. 282, 285-86 (1945); *United States v. Wurzbach*, 280 U.S. 396, 399 (1930).

With these principles in mind, we turn to the context of pre-enforcement challenges, in which this case arises. To maintain a pre-enforcement challenge a plaintiff must demonstrate a genuine threat that the allegedly unconstitutional law is about to be enforced against him. *Steffel v. Thompson*, 415 U.S. 452, 458-59 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 493-99 (1974); *Boyle v. Landry*, 401 U.S. 77, 81 (1971); *Younger v. Harris*, 401 U.S. 37, 41-42 (1971); *Golden v. Zwickler*, 394 U.S. 103, 109-110 (1969). We agree with the District Court that Brache and Franza satisfied this threshold Article III requirement, thereby permitting the District Court to proceed to adjudicate the issue of the validity of the ordinance on its face.[6] However, their facial attack failed on the merits

[6] We are willing to agree with the District Court on this point primarily because the defendants made no threshold objection to the plaintiffs' right to sue; their attack on the plaintiffs' standing was made only after it became evident that the ordinance could lawfully be applied to the plaintiffs' sale of single-use items. We note, however, that there does not appear to be any modern Supreme Court authority for the proposition that a seller of goods may obtain a federal pre-enforcement ruling as to the vagueness of a state statute, in the absence of any claim that the seller or a prospective customer has a constitutional right to sell or buy the goods. *Cf. Craig v. Boren*, 429 U.S. 190 (1976) (beer vendor had standing to litigate issue whether statute prohibiting sale of beer to males under 21 but permitting sale to females over 18 violated males' right to equal protection). *But see Hygrade Provision Co. v. Sherman*, 266 U.S. 497 (1925). The Court has stated that when a "plaintiff has alleged an intention to engage in a course of con-

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when the District Court found that the ordinance has a core meaning that gives fair notice of its application to the sale of single-use items. This valid application of the ordinance defeats the plaintiffs' facial challenge, regardless of the possibility that vagueness objections might be encountered if the ordinance is applied to their sale of multi-use items.

The crucial procedural issue presented by this appeal is whether a district court, having properly rejected a facial challenge to a local ordinance because the ordinance would be valid as applied to one activity in which the plaintiff is engaged, should proceed to adjudicate the merits of a claim that the ordinance would be unconstitutionally vague if applied to a second activity currently engaged in by the same plaintiff. In focusing on this issue, we note that it does not appear to have been posed precisely in any case decided by the Supreme Court. Most of the Court's decisions denying a party standing to make

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duct *arguably affected with a constitutional interest*, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of securing relief.' " *Babbitt v. United Farm Workers National Union, supra*, 442 U.S. 289, 298 (1979), *quoting Doe v. Bolton*, 410 U.S. 179, 181 (1973) (emphasis added). *See Steffel v. Thompson, supra*, 415 U.S. at 459-62. The constitutional right the plaintiffs assert is not the absolute right to sell their wares, but only the due process right not to be subjected to criminal penalties on the basis of a statute of uncertain meaning. *See Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). The vindication of that right in pre-enforcement proceedings would undoubtedly be useful to businessmen facing vague economic regulations, but their entitlement in the post-*Lochner* era to federal court rulings in advance of attempted enforcement by state authorities remains to be determined, perhaps soon. *See Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, —— U.S. ——, 49 U.S.L.W. 3893 (June 1, 1981), *noting probable jurisdiction in The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates*, 639 F.2d 373 (7th Cir. 1981).

an as-applied challenge to a statute have involved a party who claimed that the statute would be unconstitutionally vague as applied to the conduct of other persons. *E.g., H. L. v. Matheson*, —— U.S. ——, 49 U.S.L.W. 4255, 4257, No. 79-5903 (Mar. 23, 1981); *County Court of Ulster County v. Allen*, 442 U.S. 140, 155, 163 (1979); *United States v. Powell, supra.* The plaintiffs in this case seek a ruling as to whether the challenged ordinance would be valid as applied to a category of conduct they are currently engaged in—selling multi-use items. Though the plaintiffs' situation differs in this respect from that of the parties to whom the Supreme Court has denied standing to obtain an as-applied ruling, we think the rule of standing expressed in *Raines* required the District Court to decline to adjudicate their claim that the ordinance would be invalid if applied to their sale of multi-use items.[7]

Our conclusion is based primarily on the considerations underlying the *Raines* rule. As the Court explained in *Raines*, these considerations include the undesirability of unnecessary, premature, or unduly broad pronouncements on constitutional issues, the intrusiveness of a

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[7] *Raines* teaches that a party to whom a statute may constitutionally be applied lacks standing to challenge the statute on the ground that it would be unconstitutional as applied to "other persons" or "other situations." 362 U.S. at 21. If "other situations" means any circumstance in which the plaintiff is no longer engaging in conduct that may constitutionally be prohibited, then *Raines* would precisely apply to the plaintiffs, since they came to court engaging in conduct to which the ordinance may constitutionally be applied—selling single-use items. However, it is possible to interpret "other situations" to mean any circumstance in which the plaintiff would be engaging in conduct other than his present activities as he stands before the court. Under that interpretation, *Raines* would not precisely apply to the plaintiffs since they do not seek a ruling as to any hypothetical conduct they might engage in. But even if *Raines* should be understood not to apply to the plaintiffs directly, the force of its reasoning is fully applicable to their situation.

court's considering all the situations in which a law could possibly be applied, and the possibility of a limiting construction being placed on the law in the event an application of questionable validity was concretely presented. 362 U.S. at 21-22. These considerations apply fully when litigants, like the plaintiffs, who engage in some conduct that could validly be prosecuted under a statute, challenge the statute's application to other conduct in which they are currently engaged.

The pertinence of these considerations is illuminated by considering what would happen if the challenge the plaintiffs make was raised in defense of a criminal prosecution. If Westchester charged the plaintiffs with violating the ordinance by selling single-use items, the considerations underlying *Raines*, perhaps even the precise rule of *Raines*, would not permit dismissal of the charges on the ground that the ordinance would be vague if applied to the plaintiffs' sale of multi-use items.

This example underscores the inappropriateness of adjudicating the plaintiffs' challenge to the ordinance as applied to their sale of multi-use items in the context of this pre-enforcement civil suit. The plaintiffs have shown only a general threat of enforcement of the ordinance. We know prosecution is imminent, but we do not know whether Westchester will prosecute the plaintiffs for selling single-use items, or for selling multi-use items, or for selling both categories of items. Since a prosecution for selling single-use items would be valid, the plaintiffs are no more entitled to prevent that prosecution now than they would be to have such a prosecution dismissed once it was brought. Moreover, even if the record contained an indication that some law enforcement official was contemplating enforcement of the ordinance as applied to the plaintiffs' sale of multi-use items, it would not follow that the plaintiffs could secure an adjudication of their claim. Since they can validly be prosecuted for selling single-use

items, it is reasonable to assume that the local prosecuting authorities will proceed initially with the case that encounters no constitutional infirmity. As long as the plaintiffs are selling single-use items to which the ordinance may validly be applied, even an articulated threat of broader enforcement should not enable them to challenge other applications of the ordinance until a broader use of the ordinance is actually initiated. *Cf. O'Shea v. Littleton, supra,* 414 U.S. at 497; *Laird v. Tatum,* 408 U.S. 1, 13-14 (1972); *Boyle v. Landry, supra,* 401 U.S. at 81; *Younger v. Harris, supra; Golden v. Zwickler, supra.*

The Supreme Court has been willing to permit adjudication of challenges to the constitutionality of statutes when adjudication was not strictly necessary only in very limited circumstances involving "weighty countervailing policies." *See United States v. Raines, supra,* 362 U.S. at 22. The Court has often relaxed its prudential rules of standing when the merits of a challenge involved First Amendment rights. *See Broadrick v. Oklahoma,* 413 U.S. 601, 611-12 (1973).[8] And these rules have been relaxed to permit a litigant to assert the fundamental rights of persons who had no effective means of asserting their

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[8] *Compare Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 633-34 (1980); *Bigelow v. Virginia,* 421 U.S. 809, 817 (1975); *Lewis v. City of New Orleans,* 415 U.S. 130, 133-34 (1974); *Grayned v. City of Rockford,* 408 U.S. 104, 114-21 (1972); *Gooding v. Wilson,* 405 U.S. 518, 520-22 (1972); *United States v. Robel,* 389 U.S. 258, 265-66 (1967); *Aptheker v. Secretary of State,* 378 U.S. 500, 515-17 (1964); *Cramp v. Board of Public Instruction,* 368 U.S. 278, 282-85 (1961); and *Thornhill v. Alabama,* 310 U.S. 88, 98 (1940) *with Haig v. Agee,* —— U.S. ——, 49 U.S.L.W. 4869, 4877 n.60, No. 80-83 (June 29, 1981); *FCC v. Pacifica Foundation,* 438 U.S. 726, 742-43 (1978); *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 462 n.20 (1978); *Bates v. State Bar of Arizona,* 433 U.S. 350, 379-81 (1977); *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 58-61 (1976); *Parker v. Levy,* 417 U.S. 733, 756-61 (1974); *California v. LaRue,* 409 U.S. 109, 119 n.5 (1972).

own rights. *See, e.g., Eisenstadt v. Baird,* 405 U.S. 438, 444-46 (1972); *NAACP v. Alabama,* 357 U.S. 449, 459-60 (1958); *Barrows v. Jackson,* 346 U.S. 249, 257 (1953). Even when First Amendment rights are asserted, a litigant is denied standing to litigate an overbreadth challenge to a statute that can constitutionally be applied to his conduct unless a ruling is necessary to avert a "real" and "substantial" restraint on protected expression. *Broadrick v. Oklahoma, supra,* 413 U.S. at 615.

Two recent applications of this restrictive approach to the standing of litigants to assert overbreadth claims are pertinent to the plaintiffs' standing in this case. Litigants were denied standing to assert overbreath claims against a statute banning advertising of legal services in *Bates v. State Bar of Arizona, supra,* 433 U.S. at 380, and an agency ruling banning radio broadcasting of "indecent speech" in *FCC v. Pacifica Foundation, supra,* 438 U.S. at 743. The litigants in those cases surely had as strong an interest in knowing whether other advertisements could be placed or other broadcasts could be aired as the plaintiffs have in knowing whether multi-use items may be sold. But those litigants secured adjudication only of the narrow issue whether the challenged statute or ruling could validly be applied to the one advertisement or one broadcast before the Court. The advertisers won, and the broadcaster lost. The plaintiffs in this case, having lost their challenge to the ordinance as applied to their sale of single-use items, have no standing to secure a broader ruling concerning multi-use items, especially since their claims, unlike those in *Bates* and *Pacifica,* involve no First Amendment concerns.[9]

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[9] The plaintiffs referred to the First Amendment in their complaint, but because they did not pursue a First Amendment claim at trial, the District Court properly declined to rule on any possible First Amendment issues. *See* 506 F. Supp. at 581. No First Amendment claim has been urged on this appeal.

Our conclusion is reenforced by basic principles of equity and comity. It would be a singularly inappropriate use of a court's equitable jurisdiction to grant relief to plaintiffs currently selling single-use items to which the challenged ordinance may validly be applied, especially when the plaintiffs have shown no willingness to remove those items from their shelves.[10] Just as equity will not spare them the anxiety and expense of enduring a valid prosecution, it should not relieve them of uncertainty about the reach of an allegedly vague law that does not burden fundamental freedoms, so long as the law clearly prohibits at least some of their ongoing conduct. *See O'Shea v. Littleton, supra,* 414 U.S. at 499-504; *Younger v. Harris, supra,* 401 U.S. at 43-46, 50-51; *Boyle v. Landry, supra; Dombrowski v. Pfister,* 380 U.S. 479, 491-92 & n.7 (1965); *Douglas v. City of Jeannette,* 319 U.S. 157 (1943).

All the foregoing considerations apply with special force to a challenge brought in federal court against the law enforcement authority of a local government. Once the District Court determined that the ordinance could validly be applied to the plaintiffs' sale of single-use items, pre-enforcement consideration of the plaintiffs' claim based on the ordinance's possible application to their sale of multi-use items constituted an unwarranted interference with good faith local law enforcement. *See Steffel v. Thompson, supra,* 415 U.S. at 475-76 (1974) (Stewart, J., concurring); *Younger v. Harris, supra; Dombrowski v. Pfister, supra.*

For all these reasons, the judgment declaring the ordinance unconstitutional and enjoining its enforcement is reversed, and the cause remanded with directions to enter a judgment (1) declaring the ordinance valid on its face and valid as applied to the plaintiffs' sale of items used only for preparing, testing, or ingesting drugs, and (2) dismissing for lack of standing the plaintiffs' challenge to the ordinance's application to their sale of other items.

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[10] *Cf. United States v. Korpan,* 354 U.S. 271, 276-77 (1957); *United States v. Ragen,* 314 U.S. 513 (1942).

APPENDIX B, Opinion of the District Court.

Robert BRACHE and Edna Franza, Plaintiffs,

v.

COUNTY OF WESTCHESTER, Alfred Del Bello, Kenneth Hale, Samuel S. Yasgur, Thomas Delaney, Jerome Herlihy and Terrence Shames, Defendants.

80 Civ. 4228-CSH.

United States District Court,
S. D. New York.

Jan. 28, 1981.

Gerald B. Lefcourt, New York City, for plaintiffs; Richard Ware Levitt and Randye S. Retkin, New York City, of counsel.

Samuel S. Yasgur, Westchester County Atty., White Plains, N. Y., for defendants, Del Bello, Hale & Delaney; Jonathan Lovett, Deputy Atty., Jane Bilus Gould, Asst. County Atty., New York City, of counsel.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

Plaintiff Robert Brache owns a retail store, designated a "boutique," called the Elephant's Trunk, in Mount Kisco, Westchester County, New York State. Plaintiff Edna Franza owns the East of the Sun Boutique in Scarsdale, Westchester County. They commenced this action to challenge Local Law No. 5-1980, promulgated by the Westchester County Board of Legislators (hereinafter the "ordinance"), which amends Westchester's Consumer Protection Code to add a new Article IX entitled "Sale and Display of Drug Accessories." The defendants are the County, the county executive, and officials charged with

the enforcement of county laws. Plaintiffs sought a declaration that the ordinance violated the United States Constitution in several respects; and also that Article 39 of the New York State General Business Law, effective July 30, 1980 and dealing with "Drug-Related Paraphernalia," preempted the field. Plaintiffs prayed for a preliminary and permanent injunction of the ordinance's enforcement.

This Court entered a temporary restraining order, and scheduled an evidentiary hearing on plaintiffs' request for a preliminary injunction. That hearing was consolidated with trial on the merits. Rule 65(a)(2), F.R.Civ.P. Defendants consented to a continuance of the restraining order pending decision, a voluntary maintenance of the *status quo* which the Court appreciates. The case has been tried, and ably briefed and argued. The following constitutes the Court's Findings of Fact and Conclusions of Law under Rule 52(a).

I.

The Ordinance

The Westchester County ordinance provides as follows: "Article IX—Sales and Display of Drug Accessories

"Section 863.221. Legislative Findings. It is hereby declared and found that the sale of items used to aid the storage, use, concealment and test the strength or purity of illegal drugs is a widespraed and growing practice which is contrary to the public interest. Many parent and teacher organizations, such as the New York State Congress of Parents and Teachers, as well as Local P.T.A. groups have recognized the problem and have encouraged and endorsed legislation that would prohibit the sale of drug-related paraphernalia. Therefore, public safety,

health, welfare and morals would be best served by discontinuing the sale of such items.

"Section 863.222. Definitions. a) The term 'drug paraphernalia' means all equipment products and materials of any kind which are used, intended for use, or desinged [sic] for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of the laws of the State of New York. It includes, but is not limited to:

"1. Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

"2. Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;

"3. Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;

"4. Testing equipment used, intended for use, or designed for use in identifying or in analyzing the strength, effectiveness or purity of controlled substances;

"5. Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

"6. Dilutents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;

Appendix B

"7. Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining marihuana;

"8. Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;

"9. Capsules, balloons, envelopes and other containers used, intended for use or designed for use in packaging small quantities of controlled substances;

"10. Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

"11. Hypodermic syringes, needles and other objects used, intended for use or designed for use in parenterally injected controlled substances in the human body;

"12. Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introduced [sic] marihuana, concaine, hashish, or hashish oil into the human body, such as:

"a. Meta' wooden, acrylic, glass, stone, plastic, or ceramic pipes; with or without screens, permanent screens, hashish heads, or punctured metal bowls;

"b. Water pipes;

"c. Carburetion tubes and devices;

"d. Smoking and carburetion masks;

"e. Roach clips; meaning objects used to hold burning material such as marahuana [sic] cigarette, that has become too small or too short to be held in the hand;

"f. Miniature cocaine spoons and cocaine vials;

"g. Chamber pipes;

"h. Carburetor pipes;

"i. Electric pipes;

"j. Air-driven pipes;

"k. Chillums;

"l. Bongs;

"m. Ice pipes or chillers;

"13. 'Cocaine Spoon': A spoon with a bowl so small that the primary use for which it is reasonably adopted or designed is to hold or administer cocaine, and which is so small as to be unsuited for the typical, lawful uses of a spoon. A cocaine spoon may or may not be labeled as a 'cocaine' spoon or 'coke' spoon.

"14: 'Marijuana or Hashish Pipe': A pipe characterized by a bowl which is so small that the primary use for which it is reasonably adopted or designed is the smoking of marijuana or hashish, rather than lawful smoking tobacco, and which may or may not be equipped with a screen.

"In determining whether an object is drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

"1. Statements by an owner or by anyone in control of the object concerning its use;

"2. Prior convictions, if any, of an owner, or of anyone in control of the object, under any State or Federal law relating to any controlled substance;

"3. The proximity of the object, in time and space, to a direct violation of this Act;

"4. The proximity of the object to controlled substances;

"5. The existence of any residue of controlled substances on the object;

"6. Direct or circumstantial [sic] evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons who he knows, or should reasonably know, intend to use the object to facilitate violation of this Act; the innocence of an owner, or of anyone in control of the object, as the direct violation of this Act should not prevent a finding that the object is intended for use, or designed for use as drug paraphernalia;

"7. Instructions, oral or written, provided with the object concerning its use;

"8. Descriptive materials accompanying the object which explain or depict its use;

"9. National and local advertising concerning its use;

"10. The manner in which the object is displayed for sale;

"11. Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

"12. Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

"13. The existence and scope of legitimate uses for the object in the community;

"14. Expert testimony concerning its use.

"Section 863.223. SALE AND DISPLAY OF DRUG ACCESSORIES. It shall be violation of this code for any merchant or other person to knowingly sell, offer for sale, or display any cocaine spoon, marijuana pipe, hashish pipe, or any other drug-related paraphernalia.

"Section 863.224. PENALTIES. Notwithstanding any provision in the Westchester County Charter, the Westchester

County Administrative Code or any other local laws, a person who violates any provision of this article is guilty of a misdemeanor.

"Section 863.225. SEVERABILITY. If any clause, sentence, paragraph or part of this Local Law shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy and in which such judgment [sic] shall have been rendered.

"Section 863.226. EFFECTIVE DATE. This Local Law shall take effect on the sixtieth day after it shall have become a law."

Westchester law is one of many recent state and local enactments aimed at drug paraphernalia. They are prompted by considerations summarized in the statement of United States Deputy Assistant Attorney General Irvin B. Nathan to the House of Representatives' Select Committee on Narcotics and Drug Abuse Control (November 1, 1979), concerning the Model State Drug Paraphernalia Act (the "Model Act") drafted by the Department of Justice:

> "The Department of Justice recognizes the existence of an extensive industry in this country dealing in the manufacture and sale of implements for preparing and using illicit drugs, primarily marijuana and cocaine. The products include 'roach clips,' water pipes, cocaine spoons and sophisticated kits used to test or process these drugs. We have been advised that total sales of these products amount to at least several hundred million dollars annually.
>
> "The advertising, display and open sales of these implements, usually in so-called 'head shops' and often

> in conjunction with the sale of legitimate products promoted among adolescents, are an affront to the communities in which these shops exist because they appear to condone and even glamorize the use of illegal drugs. The attraction of such shops to minors is of particular concern to these communities. As a result, interested community groups have increasingly begun to demand governmental action to deal with the drug paraphernalia industry." Statement, p. 2.

These sentiments find expression in the legislative findings appearing at § 863.221 of the Westchester ordinance.

Store owners having reason to believe that they may be prosecuted under drug paraphernalia laws have challenged their constitutionality in a number of federal district courts, to whose ranks this Court is now added.

II.

Summary of Plaintiffs' Contentions

Plaintiffs contend that the Westchester ordinance violates the United States Constitution in the following respects:

It is void for vagueness, in violation of the Due Process Clause of the Fourteenth Amendment.

It impermissibly restrains free speech, in contravention of the First and Fourteenth Amendments.

It is directed against a certain kind of store, and thus represents a bill of attainder subject to selective enforcement, in violation of the Equal Protection Clause of the Fourteenth Amendment, and the Bill of Attainder Clause in Article I, Section 9.

It contravenes the Equal Protection Clause because it is not rationally related to any legitimate legislative goal.

It lacks arrest and search standards, in violation of the Fourth Amendment.

It impermissibly burdens interstate commerce, in violation of the Commerce Clause, Article I, Section 8.

Plaintiffs' proof and arguments have focused upon the vagueness and equal protection theories.

In addition, as noted *supra,* plaintiffs alleged that the ordinance is preempted by a recently enacted state law. I deal with that contention first.

III.

Preemption

[1] The complaint alleged preemption of the Westchester ordinance by a state statute, but plaintiffs do not now urge it as a basis for invalidating the ordinance. While one cannot say that plaintiffs have abandoned preemption, they would clearly prefer a resolution of the constitutional issues. Nonetheless, the issue must be addressed. Federal district courts, in their evaluation of statutes, must avoid constitutional issues if other grounds exist for decision. *United States v. Batchelder,* 442 U.S. 114, 122, 99 S.Ct. 2198, 2203, 60 L.Ed.2d 755 (1979). Judge Elfvin of the Western District of New York observed that principle when, "in order to avoid unnecessary adjudication of constitutional issues," he considered *sua sponte* whether the state law in question herein preempted Erie County's local drug paraphernalia law. *Hoetzer v. County of Erie,* 497 F.Supp. 1207, at 1214 (W.D.N.Y., 1980). Having answered that question in the affirmative, Judge Elfvin did not reach the constitutional challenges to the Erie County law. If I reach the same conclusion with respect to the Westchester ordinance, I will not reach them either.

[2] Judge Elfvin, citing New York cases, said that "[a] local law is preempted when the state has acted in a particular field and in so acting has evidenced an intention to occupy entirely such field to the exclusion of local law." I agree with his articulation of the test, but re-

spectfuly disagree with the conclusion that the state law in question preempts local criminal laws aimed at drug paraphernalia.

The state law is Article 39 of the General Business Law, §§ 850-853, effective July 30, 1980. The full text is reproduced in the margin.[1] The statute is civil in nature. It

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[1] § 850:

"As used in this article, unless the context clearly requires otherwise, the following words or terms shall have the following meanings:

"1. 'Controlled substance' shall have the same meaning as defined in section three thousand three hundred two of the public health law.

"2. 'Drug-related paraphernalia' consists of the following objects used for the following purposes:

"(a) Kits, used or designed for the purpose of planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

"(b) Kits, used or designed for the purpose of manufacturing, compounding, converting, producing, or preparing controlled substances;

"(c) Isomerization devices, used or designed for the purpose of increasing the potency of any species of plant which is a controlled substance;

"(d) Scales and balances, used or designed for the purpose of weighing or measuring controlled substances;

"(e) Diluents and adulterants, including but not limited to quinine hydrochloride, mannitol, mannite, dextrose and lactose, used or designed for the purpose of cutting controlled substances;

"(f) Separation gins, used or designed for the purpose of removing twigs and seeds in order to clean or refine marihuana;

"(g) Hypodermic syringes, needles and other objects, used or designed for the purpose of parenterally injecting controlled substances into the human body;

"(h) Objects, used or designed for the purpose of ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body."

(footnote continued on following page)

declares the sale or possession with intent to sell of "drug-related paraphernalia," as defined in § 850, to be a

(footnote continued from preceding page)

§ 851:

"It shall be a violation of this article for any person, firm or corporation to possess with intent to sell, offer for sale, or purchase drug-related paraphernalia under circumstances evincing knowledge that the paraphernalia is possessed, sold or purchased for one or more of the drug-related purposes stated in subdivision two of section eight hundred fifty of this article."

§ 852:

"1. A county, town, city or village which issues a license or permit authorizing any person, firm or corporation to engage in the selling or offering for sale of any merchandise may revoke such license or permit upon a finding, pursuant to a hearing held thereon, that such person, firm or corporation has sold or offered for sale merchandise in violation of this article.

"2. The possession with intent to sell or offering for sale of drug-related paraphernalia as defined herein is hereby declared to be a nuisance, and where any such drug-related paraphernalia shall be taken from the possession of any person, the same shall be surrendered and forfeited to the sheriff of the county wherein the same shall be taken, except that in a city having a population of seventy-five thousand or more, the same shall be surrendered and forfeited to the police commissioner or other head of the police force or department of said city and except that in the counties of Nassau and Suffolk, the same shall be surrendered and forfeited to the commissioner of the county police department."

§ 853:

"The attorney general of any state or local health officer, town, village or city attorney, or the chief executive officer of a municipality may institute an action in a court of competent jurisdiction to enjoin any activity prohibited pursuant to section eight hundred fifty-one of this chapter. If such court finds that any person, firm or corporation has sold or offered for sale any drug-related paraphernalia, it shall assess civil penalties against such person, firm or corporation in an amount not less than one thousand dollars nor more than ten thousand dollars for each such violation."

"nuisance," § 852(2), and forbids such possession or sale. § 851. Violators may lose their vending licenses or permits, § 852(1), have their goods forfeited, § 852(2), and be subjected to monetary "civil penalties," § 853, as well as an injunction against future violations. *Id.*

The Westchester ordinance is criminal in nature. Violation of its provisions constitutes a misdemeanor. § 863.224.

[3] As Judge Elfvin observed in *Hoetzer, supra,* at 1215, under New York law the local county governments "have been delegated nearly the full measure of New York's police power." The police power extends to the enactment of legislation intended to curtail illicit drug use, *Robinson v California,* 370 U.S. 660, 664, 82 S.Ct. 1417, 1419, 8 L.Ed.2d 758 (1962), which if properly drawn may prohibit the sale of drug-related devices. *Geiger v. City of Eagan,* 618 F.2d 26, 28 (8th Cir. 1980). Westchester has attempted such legislation in the case at bar. As we shall see, the Westchester ordinance, at least in its definitional provisions, is based upon the Model Act, a criminal statute drafted by the Justice Department to assist local governments confronted by constitutional challenges to their drug paraphernalia laws. The New York legislature could have adopted its own "model act," as indeed other states have done, *see, e.g., The Casbah, Inc.* v. *Thone, Governor of Nebraska,* No. 80-0-271 (D.Neb., Sept. 26, 1980). It chose instead to enact a civil statute, making available, *inter alia,* injunctive relief not found in the criminal law. But it does not follow that the legislature intended to preempt local governments from attempting to impose constitutional criminal sanctions, as the drafters of the Model Act encouraged them to do. As Judge Elfvin observes, the drafters of the state law noted "that local communities had passed ordinances relating to drug paraphernalia," *Hoetzer, supra,* at 1216; he infers from the statute's silence on those ordinances

"an intent to make the state enactment the sole remedy." *Id.* at 1216. I draw the opposite inference. The new state law adds civil remedies to the criminal sanctions existing not only under local law, but state law as well;[2] I do not observe in the state's latest enactment an intent to withdraw from local governments their police power right to enact criminal laws addressing the serious drug paraphernalia problem. Surely the state law contains no express declaration of preemptive intent; and I decline to infer it in the circumstances.

Accordingly the plaintiffs' constitutional challenge to the ordinance must be considered.[3] I do so against the

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[2] The New York Penal Law, § 220.50, provides.

"A person is guilty of criminally using drug paraphernalia in the second degree when he knowingly possesses or sells:

"1. Diluents, dilutants or adulterants, including but not limited to, any of the following: quinine hydrochloride, mannitol, mannite, lactos [sic] or dextrose, adapted for the dilution of narcotic drugs or stimulants under circumstances evincing and [sic] intent to use, or under circumstances evincing knowledge that some person intends to use, the same for purposes of unlawfully mixing, compounding, or otherwise preparing any narcotic drug or stimulant; or

"2. Gelatine capsules, glassine envelopes or any other material suitable for the packaging of individual quantities of narcotic drugs or stimultants under circumstances evincing an intent to use, or under circumstances evincing knowledge that some person intends to use, the same for the purpose of unlawfully manufacturing, packaging or dispensing of any narcotic drug or stimulant.

"Criminally using drug paraphernalia in the second degree is a class A misdemeanor."

[3] Defendants do not urge the doctrine of abstention. The federal courts considering the constitutionality of drug paraphernalia laws uniformly reject the suggestion that they should abstain, for the reasons summarized in *Record Revolution No. 6, Inc. v. The City of Parma*, 638 F.2d 916, at 925-926, No. 80-3308 (6th Cir., Dec. 8, 1980). See also *High Ol' Times, Inc. v. Busbee*, 621 F.2d 135 (5th Cir. 1980).

background of their commercial ventures as revealed by the evidence.

IV.

The Plaintiffs' Operations

Brache's boutique, the Elephant's Trunk, sells clothing, jewelry, and assorted gifts. A "smoking accessories" section, located upstairs, produces between 30% and 50% of the store's profits. No tobacco products are sold in the "smoking accessories" section. The stock consists of items which the evidence clearly shows are used primarily for smoking or ingestion of marijuana or cocaine (*e.g.*, bongs, toke-o-matic 20 bong hitters, marijuana test kits, Deering preparation ktis, marygins, cocaine kits); and other items which may be used for licit or illicit purposes (*e.g.*, pipes, screens, clips, rolling papers, mirrors, small spoons). A number of the items are embossed with marijuant leaf designs. Copies of the Cocaine Consumers Handbook and Marijuana Growers Guide are available for purchase. Conversation between county undercover investigators and sales personnel at the Elephant's Trunk made it clear that the latter knew they were selling items intended for drug use.

The operations at Ms. Franza's boutique, East of the Sun, are comparable. The store sells combs, jewelry, wallets, leather bags, crystal, some clothing items, and other gifts. The "smoking accessories" section at the rear of the store stocks a combination of clearly drug-related items, and items which could be used with drugs or with other substances. Conversations between undercover investigators and East of the Sun sales personnel, including on one occasion plaintiff Franza herself, demonstrated the salespersons' awareness that the buyers wished to purchase drug paraphernalia.

Appendix B

Plaintiffs testified at trial, in essence, that they did not know where these items came from, what they were for, or to what purpose the purchasers would put them; their only purpose and concern was selling items, any items, for profit. I reject these *apologias* as unworthy of belief. The catalogues from which a number of the items were ordered proclaimed their efficacy in the drug culture. Certain of the items had no conceivable purpose other than the preparation or ingestion of drugs. The arrangement of the inventory and the conversations of the sales personnel manifested awareness that drug paraphernalia were being sold to drug users.

I find that both plaintiffs were knowingly selling certain items which unquestionably constituted "drug paraphernalia" to drug users; and that the Westchester ordinance would put them on notice, in respect of at least those items, that this was illegal.

V.

Plaintiffs' Standing to Raise the Constitutional Issues

[4] Defendants argue from the foregoing evidence that the plaintiffs' complaint must be dismissed. That is because, the argument runs, the constitutionality of the ordinance should be judged as applied to these plaintiffs, rather than on its face, and, as applied to them, the ordinance is valid.

I reject that argument. While plaintiffs' pre-trial affidavits demonstrated sufficient threats of prosecution to present an "actual controversy," *Steffel* v. *Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), and the evidence at trial revealed the basis for the threats, the fact remains that no criminal prosecution under the preliminarily restrained ordinance has been commenced,

against these plaintiffs or anyone else. That distinguishes the case at bar from *Ulster County Court v. Allen,* 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979), and *United States v. Herrera,* 584 F.2d 1137 (2d Cir. 1978), cited by defendants for the proposition that I should not consider the facial validity of the ordinance. In *Allen* and *Herrera* the defendants sought to attack the facial validity of the statutes pursuant to which they had been indicted, tried and convicted. "As a general rule," the *Allen* Court stated, "if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third-parties in hypothetical situations." 442 U.S. at 155, 99 S.Ct. at 2223. However, in the absence of "a formal, factual development as to the actual practices of enforcement," at least in respect of the litigants, an insufficient basis exists for adjudicating validity as applied. *Hejira Corp. v. MacFarlane,* Crim.Action No. 80-F-824 (D.Colo., Sept. 15, 1980) (oral opinion at Tr. 9).

Furthermore, while I have found that plaintiffs could have learned from the ordinance that the sale of certain items was prohibited, substantial constitutional questions arise from the ordinance in its entirety. I address those questions *infra.* The present point is that the evidence does not foreclose plaintiffs from professing uncertainty as to the full range of commercial activity that the ordinance forbids. That issue arises from the face of the ordinance, and facial analysis is appropriate. I agree with Judge Coffrin's analysis, relied upon by plaintiffs, in *Goguen v. Smith,* 471 F.2d 88, 92 (1st Cir. 1972), *aff'd,* 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974):

> ". . . if the nature of a party's conduct is not so dissimilar from other behavior sought to be proscribed by a statute, such that an interpretation dis-

> tinguishing his behavior from that of others would not provide more certain notice to potential offenders and would also seem unwarranted in the light of a legislative determination to cover all such activities, then a void-for-vagueness challenge allows a court to rule on the facial constitutionality of that statute."

The ordinance at bar is intended to apply to all retailers of drug paraphernalia. There is no reason to suppose that the marketing operations of these particular plaintiffs are dissimilar "from other behavior sought to be proscribed." All the drug paraphernalia cases from other districts to which I have been cited consider the facial validity of the statutes or ordinances at issue except *Tobacco Road v. City of Novi*, 490 F.Supp. 537 (E.D.Mich., 1979). To the extent that *Novi* requires a different analysis, I decline to follow it.

Accordingly, I turn to plaintiffs' constitutional challenge to the face of the Westchester ordinance.

VI.

Vagueness

The requirement that statutes not be vague is grounded in the concept of due process. In *Grayned v. Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-2299, 33 L.Ed.2d 222 (1972), the Supreme Court stated generally:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Sec-

ond, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." (footnotes omitted).

[5] Drug paraphernalia laws are frequently attacked for impermissible vagueness. Some laws have been declared unconstitutional,[4] and others held valid.[5] Two dominant themes emerge from the cases: (i) whether the definition of "drug paraphernalia" is too vague; and (ii) if so, whether that vagueness is remedied by the law's further requirements of knowledge or intent. The second inquiry is pertinent because an ascertainable standard of guilt, sufficient to give fair notice to the offender and adequate guidelines to enforcement agencies, may be achieved through specific *mens rea* or *scienter* requirements. That is to say, a statute otherwise void for vagueness may be saved by inclusion of a specific *mens rea* as an element of the crime. *United States v. International Minerals and Chemical Corp.*, 402 U.S. 558, 91 S.Ct. 1697, 29 L.Sd.2d 178 (1971); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963); *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed. 367 (1952); *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945);

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[4] See, *e.g.*, *Knoedler v. Roxbury Township*, 485 F.Supp. 990 (D.N.J. 1980); *Weingart v. Town of Oyster Bay*, No. 79 C-2932 (E.D.N.Y., Dec. 17, 1979).

[5] See, *e.g.*, *Tobacco Road v. City of Novi*, 490 F.Supp. 537 (E.D.Mich., 1979); *The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates*, 485 F.Supp. 400 (N.D.Ill. 1980).

Appendix B

United States v. Ragen, 314 U.S. 513, 62 S.Ct. 374, 86 L.Ed. 383 (1942); *Gorin v. United States,* 312 U.S. 19, 61 S.Ct. 429, 85 L.Ed. 488 (1941); *Omaechevarria v. Idaho,* 246 U.S. 343, 38 S.Ct. 323, 62 L.Ed. 763 (1918) The statute need not use the word "intent"; knowledge, if required as an element of the crime, is construed as the equivalent of intent. *Boyce Motor Lines, supra,* 342 U.S. at 342, 72 S.Ct. at 331: "The statute punishes only those who *knowingly* violate the Regulation. This requirement of presence of culpable intent does much to destroy any force in the argument that application of the Regulation would be so unfair that it must be held invalid."

The drafters of the Model Act were well aware of the potentially saving grace of knowledge and intent requirements. Deputy Assistant Attorney General Nathan, addressing the House Committee, summarized the problem at p. 3 of his statement:

> "The states which have passed comprehensive paraphernalia legislation however, have found themselves under continual constitutional attack. The wide range of implements used as drug paraphernalia, and the fact that many of these items have innocent uses, make it difficult to draft paraphernalia legislation which is not unconstitutionally vague or broad."

Nathan went on to describe the Model Act's solution:

> "The model statute attempts to address the primary constitutional objections to the existing state laws, i.e., they are void for vagueness because they do not give fair notice as to what is proscribed. First, the statute enumerates with considerable specificity the precise items which are banned. Secondly, and even more importantly, the statute requires that a defendant charged with possession have the 'specific intent' to use the item in conjunction with the con-

sumption of a controlled substance. With respect to manufacturers and sellers, there is a requirement that they know or have a substantial reason to know that the items will ultimately be used with a controlled substance. To assist in ascertaining the specific intent or knowledge of a defendant, the statute sets forth more than a dozen circumstances suggesting when an item should be deemed to be drug paraphernalia.

"These provisions of the Act go far to eliminate the vagueness objections to prior paraphernalia legislation by giving fair notice to any potential violator that his conduct is proscribed if he possesses the requisite intent. The innocent user of paraphernalia-type implements is therefore protected to the maximum extent possible." *Id.* at 5-6.

The Model Act's provisions requiring knowledge and intent are contained in both the definitional and substantive violation sections. Article I, "Definitions", defines "drug paraphernalia" as "all equipment, products and materials of any kind which are used, intended for use, or designed for use" in drug-related activity. In the Comment on this provision, the drafters of the Act say:

"To insure that innocently possessed objects are not classified as drug paraphernalia, Article I makes the knowledge or criminal intent of the person in control of an object a key element of the definition. Needless to say, inanimate objects are neither 'good' nor 'bad,' neither 'lawful' nor 'unlawful.' Inanimate objects do not commit crimes. But, when an object is controlled by people who use it illegally, or who intend to use it illegally, or who design or adapt it for illegal use, the object can be subject to control and

the people subjected to prosecution. Article I requires, therefore, that an object be used, intended for use, or designed for use in connection with illicit drugs before it can be controlled as drug paraphernalia." Comment, pp. 6-7 (1979).

The Model Act also requires specific knowledge as an element of the substantive offenses created by Article II. Section B contains the provision pertinent to sellers:

> "It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Act. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than (), fined not more than (), or both."

The Comment to the Act, p. 9-10, bases this provision on the proposition that "[s]uppliers who furnish goods or services knowing they will be used to facilitate a crime are not immune from liability," quoting from *Backun v. United States*, 112 F.2d 635, 637 (4th Cir. 1940):

> "To say that the sale of goods is a normally lawful transaction is beside the point. The seller may not ignore the purpose for which the purchase is made *if he is advised of that purpose*, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. One who sells a gun to another

> *knowing that he is buying it to commit a murder,* would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun; and no difference in principle can be drawn between such a case and any other case of a seller *who knows that the purchaser intends to use the goods which he is purchasing in the commission of a felony.* In any such case, not only does the act of the seller assist in the commission of the felony, but his will assents to its commission, since he could refuse to give the assistance by refusing to make the sale." (emphasis added).

State and local laws modeled upon the Model Act have been upheld by a number of district courts.[6] However, in *Record Revolution No. 6 v. The City of Parma, supra,* the Sixth Circuit struck down as unconstitutionally vague and overbroad Ohio municipal ordinances "based almost verbatim" on the Model Act. At 919. Reversing the district court, the Sixth Circuit held that "[i]f the definition of 'drug paraphernalia' is vague or overbroad in any respect, the ordinances must be declared unconstitutional." At 928. The court then focused on the phrases "used, intended for use, or designed for use" which appear in Article I of the Model Act, and were adopted verbatim by the Ohio ordinances (as they are in § 863.222(a) of the Westchester ordinance). The *Parma* court concluded that "[t]he statutory terms 'use' or 'intended for use' are not vague or overbroad," at 929; the court solved the problem of "transferred intent" (from guilty manufacturer or purchaser to innocent seller) by construing the statute to require that the requisite knowledge or intent be that of

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[6] See *Mid-Atlatic Accessories Trade Association v. State of Maryland,* 500 F.Supp. 834, (D.Md., 1980) and cases cited at 842.

the individual accused. *Id.* at 928-929. However, the phrase "designed for use" was condemned as vague and overbroad. The Sixth Circuit reasoned:

> "Vagueness enters in our case once the ordinances begin to define drug paraphernalia in terms of the primary adapation or dominant purpose of the design. Then the definition begins to depend upon the ingenuity or purpose of the purchaser rather than the seller and upon the current practices of the clandestine society of drug users. *Geiger v. City of Eagan,* 618 F.2d 26 (8th Cir. 1980); *Music Stop, Inc. v. City of Ferndale,* 488 F.Supp. 390 (E.D.Mich., 1980).
>
> "The major ambiguity in defining drug paraphernalia in terms of the 'design' of items is the lack of any design characteristics that distinguish lawful purposes from unlawful purposes. The type of object that can become, or be used as, drug paraphernalia is limited only by the imagination of the user. *Geiger v. City of Eagan,* 618 F.2d at 29. The record in our cases established the absence of any unique design characteristics."

The district court in *Parma,* while invalidating parts of the ordinances, concluded that constitutionality could be preserved by severing out what was invalid. Article IV of the Model Act contains a severability clause applicable to any of its provisions. Section 863.225 of the Westchester ordinance contains comparable language. However, in *Parma* "[t]he explicit terms of the ordinances, unlike the Model Act, limit severability to the section describing the substantive offenses." At 931. The Sixth Circuit thereupon observed:

> "Therefore, the defective parts of the definition cannot be severed. Moreover, the vagueness and over-

breadth of the definition infect the whole ordinance." *Ibid.*[1]

A view contrary to *Parma* was expressed by the district court in *Mid-Atlantic Accessories Trade Association v. State of Maryland, supra.* Judge Harvey, upholding the constitutionality of a Maryland statute based upon the Model Act, contrasted the Model Act with earlier, invalid efforts to control drug paraphernalia:

> "The most important difference is that the Model Act is structured so that an essential element of proof in every case is a showing of specific intent. Statutes other than those based on the Model Act lack this requirement in varying degrees, and as the various cited opinions indicate, it is this requirement of specific intent which has saved the Model Act." At 543.

Judge Harvey perceived no unconstitutional vagueness in the phrase "designed for use." He analyzed the definitional section of the statute thus:

> " 'Design' connotes an intentional act as well as an objective set of characteristics. When considered in the context of this statute, it is clear that it is the subjective, intentional sense in which 'designed' is used.
>
> "The fact that 'designed for use' and 'intended for use' are used in the disjunctive throughout the Act does not necessarily indicate that each of the two phrases means something entirely different. Rather, it is apparent from a reading of the Act in its entirety that

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[1] With due respect, I am puzzled by the juxtaposition of these two sentences. The word 'moreover" seems to suggest that even if the offending phrase could be severed, it would nonetheless "infect the whole ordinance"; but how can it do so, if the infecting organism has been excised by severance? But I need not grapple further with this seeming anomaly, since as noted *supra* the severability provision of the Westchester ordinance extends to all provisions of the laws.

> all three verbs (i.e., used, designed and intended) were included in the definition of drug paraphernalia so that the terms would be applicable to all the kinds of conduct barred in the Act's substantive sections. A seller will 'intend' an item for use, while a manufacturer is more likely to 'design' an item for use, and a user will simply 'use' the item." *Id.* at 844-45.

Free as I am to choose between the analyses of Sixth Circuit and the District of Maryland, I prefer the latter. One may agree with the Sixth Circuit that there is a "lack of any design characteristics that distinguish lawful purposes from unlawful purposes,' at least in respect of certain items; but common English usage supports the district court's observation in *Mid-Atlantic* that "'[d]esign' connotes an intentional act as well as an objective set of characteristics." The prosecution may have some difficulty proving that a manufacturer intentionally "designed" for drug use an item which could have others, but that is a different question. The element of scienter necessary to preserve a law from vagueness adds, by definition, another fact for the prosecution to establish by competent evidence. The drafters of the Model Act sought to eliminate vagueness and transferred intent by requiring the requisite elements of knowledge or intent on the part of manufacturer, seller, or user, in order to bring a particular artifact within the definition of "drug paraphernalia.' I see no basis for holding that they succeeded in respect of the phrase "intended for use," but failed with "designed for use."

However, as the court also observed in *Mid-Atlantic,* the saving requirement of specific intent has two aspects: defining "drug paraphernalia'; and delineating the elements of the substantive offense.

> "SB 63 [the Maryland statute] incorporates a specific intent standard in two ways. First, drug parapher-

nalia is defined in § 287A(A) as any item 'used, designed for use, or intended for use' with illegal drugs. Secondly, the substantive offenses are defined in terms of specific intent. The prohibited acts are (1) using drug paraphernalia, or possessing same with intent to use, to, *inter alia,* inject, ingest, inhale or otherwise introduce illegal drugs into the human body (§ 287A (C)) and (2) selling or manufacturing drug paraphernalia knowing or under circumstances where one reasonably should know, that the drug paraphernalia will be used, to, *inter alia,* inject, ingest, inhale or otherwise introduce illegal drugs into the human body. (§ 287A(D)). In the absence of the first sort of specific intent, nothing is drug paraphernalia. In the absence of the second, no act committed by a person and involving drug paraphernalia is prohibited." Id. at 844.

[6] It is at the second stage—definition of the substantive offense—that the Westchester County legislators departed from the Model Act. Section 863.223 of the ordinance, defining the substantive offense, provides only that it is a violation of the code "for any merchant or other person to knowingly sell, offer for sale, or display any cocaine spoon, marijuana pipe, or any other drug-related paraphernalia." The parties debate in their briefs whether "knowingly" modifies only "sell, offer for sale, or display." or "drug paraphernalia," the defendants contending for the latter because it constitutes a more demanding scienter requirement and thus reinforces constitutionality. But I may accept that construction and still conclude, as I do, that proof of knowledge of *actual use* is essential to the constitutional validity of such laws.

The drafters of the Model Act clearly regarded such proof as necesary to repel constitutional attack. "[E]ven more importantly," said Deputy Assistant Attorney Gen-

eral Nathan to the House Committee, "there is a requirement [with respect to sellers] that they know or have a substantial reason to know that the items will ultimately be used with a controlled substance." Absent that requirement, a merchant would be subject to criminal conviction for selling an item thereafter put to entirely innocent use. That is not acceptable, at least in respect of items such as pipes, spoons and clips, capable of both lawful and unlawful use, and hence not contraband *per se*.[8]

The primary constitutional deficiency is that without the requirement that the seller know the item was to be used with drugs, an unacceptable risk of arbitrary and discriminatory enforcement arises. The Model Act's scienter requirement in the substantive offense section obliges an arresting officer to have probable cause to believe that the seller knew the purchaser would, in fact, use the item with drugs. A comparable requirement appears in N.Y. Penal Law § 220.50, quoted at n.2 *supra*. Such evidence may be developed in an investigation, as the case at bar indicates. Eliminate that requirement, and law enforcement authorities are given an impermissible latitude in arresting and prosecuting merchants on the basis of the authorities' subjective perceptions of the nature of the business being conducted. This implicates the second, and discrete, concern expressed in *Grayned, supra*: that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." 408 U.S. at 108, 92 S.Ct. at 2298.

Parma illustrates the problem:

> "The testimony of Detective Bennett and Rutt, qualified experts on narcotics law enforcement, shows con-

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[8] This analysis does not apply to items, some of which the present plaintiffs sell, whose only conceivable use relates to the preparation or ingestion of drugs. An ordinance limited to such items would stand upon a different constitutional footing.

vincingly the danger of arbitrary and discriminatory enforcement of the ordinances by the police. Detectives Bennett and Rutt would arrest any retailer who sold pipes with screens or chamber pipes, despite the ability to use these pipes lawfully. App. 712-13, 717-18, 550-51. Detective Rutt would arrest a retailer operating a 'head shop' if it sold alligator clips or cigarette papers, but not a drug store owner selling the same items. App. 853, 864-65. This testimony suggests that the ordinances would be enforced only against 'head shops,' as designated by the local law enforcement officials. No guidelines have been written to prevent such selective discriminatory enforcement. Because the ordinances would permit at least the arrest and prosecution of persons by police and prosecutors who claim to know drug paraphernalia when they see it, but cannot define it any more precisely in advance, the definition of drug paraphernalia is vague and overbroad." At 931 (footnotes omitted).

Virtually identical testimony was given in the case at bar by Karl Fulgenzi, Deputy Commissioner of the Department of Public Safety for Westchester County. That testimony is fairly paraphrased in plantiffs' post-trial brief at pp. 37-39, set out in the margin.* While Com-

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*"He insisted time and time again that anyone displaying or selling a pipe with a screen is in violation of the Ordinance (Tr. 759, 761, 785-8, 802, 811, 824, 918, 920, 823), in stark contrast to Don Good's and Mark Kilik's [expert witnesses] testimony that screens were originally developed for use with tobacco and served as a cooling mechanism for any type of smoking agent, preventing the mixing of tobacco, tars, and saliva in the heel of the pipe (Tr. 546, 547, 1081). (Curiously, he also testified that if *he* were to put a screen into a pipe he purchased, that pipe

(footnote continued on following page)

missioner Fulgenzi expressed his commendable intention to train his police officers carefully in enforcement of the ordinance, uncertainties are inherent in its terms, as he forthrightly conceded:

> "Q. [by plaintiffs' counsel] But couldn't officers reasonably disagree as to what implies, as you term it,

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(footnote continued from preceding page)

would not constitute paraphernalia (Tr. 922-24)). He additionally said that anyone displaying plaintiffs' EG-11, an antique which has been and could be used as either a pipe or cigar holder, would in all circumstances be in violation of the Ordinance, and asserted that the Ordinance places the burden on the storeowner to determine whether the items he sells are legal or illegal (Tr. 817-18). At one point, he simply said that one would have to consult an expert to determine whether a particular item could be lawfully sold (Tr. 816).

"Perhaps most revealing was Commissioner Fulgenzi's position that at some point a store becomes so saturated with 'head shop' items that sale or display of virutally any dual-use or multi-use product would constitute a crime (Tr. 886-88).

"Thus, a novelty and gift store which decides to stock rolling papers and tobacco is 'fine' (Tr. 889). The owner could add the 'average' pipe and still 'get away with not being arrested' (Tr. 889). A scale could be added without a problem, so long as it wasn't sold in response to requests for a drug weighing device (Tr. 889). Jewelry cases could be added as well (Tr. 890), but at this point the proprietor would be 'getting dangerously close' to being in violation, just by 'put[ting] nothing but this sort of product in a particular section of your store' (Tr. 898-91). Adding cigarettes would leave the owner 'in dangerous territory' and he would be 'getting at the borderline of getting arrested,' (Tr. 891) 'depend[ing] on the administration of the particular department and how they educate their personnel to make sure enforcement is done properly.' (Tr. 892).

"When, however, a book section was added with 100 book titles, including *The Marijuana Grower's Guide* and *The Cocaine Consumer's Handbook*, the store had 'definitely' crossed the line (Tr. 895). But, if the store were larger and the scale were moved to a jewelry section, 'you might be safe,' the Commissioner first said (Tr. 896), changing his opinion thereafter (Tr. 897)."

that it is being used or being offered for sale in an illegal manner as opposed to a legal manner?

"A. I could only say officers do make mistakes occasionally and that's why we have issues that go to court.

"Q. But as a store owner then I would have to guess—

"A. No.

"Q. —as to how I am displaying it, as to the manner of display, as to what an officer might think about me and not necessarily about the object.

"A. I believe as a store owner, as I indicated earlier, sir, it should be your business to know what you are selling and does it comply with laws.

"THE COURT: Well, Mr. Lefcourt's last question was not whether or not policemen occasionally make a mistake. Of course they do. Everyone does. District judges do.

"His question was, would it not be possible, under the phrasing of this ordinance, for two separate police officers to reasonably disagree between themselves as to whether or not the factors indicate drug paraphernalia or not?

"THE WITNESS: Absolutely, yes, they could reasonably disgree.

"THE COURT: Do you think such a disagreement between police officers could arise from the wording of the ordinance?

"THE WITNSS: Exactly, yes, very much so." Tr. 840-841.

It is precisely at this point of enforcement uncertainty that the additional requirement of knowledge of illicit use, included in the Model Act and Penal Law § 220.50 but omitted from the Westchester ordinance, performs its saving office. Enforcement agencies may then be instructed that, in the absence of such knowledge, "no act committed by a person and involving drug paraphernalia

is prohibited." *Mid-Atlantic, supra.* Guided by that instruction, officers and prosecutors will be far less prone to initiate or press proceedings against retailers on the basis of subjective, inadequately defined, and hence arbitrary or discriminatory criteria.[10] That the present ordinance suffers from that constitutional defect emerges clearly from the record.

While recognizing the laudable desire of the legislature to address a perceived social evil, I conclude that the Westchester drug paraphernalia ordinance, as presently drafted, is unconstitutionally vague on its face.

VII.

Other Constitutional Theories

[7] Plaintiffs offered evidence in support of one additional constitutional challenge to the ordinance: the asserted absence of any rational relation to a legitimate government purpose. That absence is said to violate the Due Process Clause of the Fourteenth Amendment.

Plaintiffs rely upon the expert opinion testimony of Norman Zinberg, M.D., a clinical professor of psychiatry at Harvard Medical School, and a member, *inter alia,* of

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[10] As noted *supra,* the Model Act, Article II, Section B, provides that it is unlawful to 'deliver" drug paraphernalia "knowingly, *or under circumstances where one reasonably should know,* that it will be used" in connection with drugs. Courts have divided on the validity of the italicized phrase. Compare *Parma, supra,* at 936 ("[b]ecause most uses of the outlined items are lawful and common, the 'reason to know' standard is took open-ended and too susceptible to misapplication to satisfy the dictates of due process") with *Mid-Atlanitc, supra* at 845 ("The 'reasonably should know' clause is simply an elaboration of 'knowing'. A constructive knowledge standard in a criminal statute is not an impermissibly vague one"). Since the issue is not presented by the present wording of the Westchester ordinance, I intimate no view upon it.

the Council of the National Institute for Drug Abuse and the Council of the National Institute of Mental Health. It is Dr. Zinberg's firmly held belief, to which he has given voice in numerous articles and appearances before tribunals and legislative bodies, that "prohibition, whether it is couched in legislative terms or starting a war against a certain substance, has not only usually created more use, but has increased deleterious use." Plaintiffs' post-trial brief at p. 8, summarizing Dr. Zinberg's trial testimony. Dr. Zinberg illustrated his theory by reference to the attempted prohibition of alcohol in this country, and the unsuccesful "war" waged by the United States Armed Services against the use of marijuana in Vietnam, the witness further testifying that such efforts contributed directly to increased use of heroin among service personnel stationed in that country.

While Dr. Zinberg expressed his opinions in a forceful and articulate manner, he candidly conceded that other experts, qualified in the field, enterained contrary vieews with respect to the efficancy of drug and drug-related legislation.

[8] This testimony does not rise to the level of demonstrating a due process violation. Drugs and their impact upon the population are a legitimate source of governmental concern. A local government "clearly has the power through a properly drawn ordinance to discourage the availabiilty of drugs and the accepptance of drug use by prohibiting the sale of drug-related devices." *Geiger v. City of Eagan, supra,* at 28. The ordinance in suit would be vulnerable to this aspect of due process attack only if I were prepared to hold that it is "not reasonably restricted to the evil with which it is said to deal," *Butler v. Michigan,* 352 U.S. 380, 383, 77 S.Ct. 524, 525, 1 L.Ed.2d 412 (1957), or that Dr. Zinberg's opinions are so clearly and irrefutably correct that the legislature acted irra-

tionally in adopting a contrary view. I conclude, however, that on the present state of scientific knowledge, the county legislators were free to choose between conflicting theories of prevention, cause and effect. "The Due Process Clause does not empower the judiciary 'to sit as a superlegislature to weight the wisdom of legislation' . . ." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124, 98 S.Ct. 2207, 2213, 57 L.Ed.2d 91 (1978). Courts, however they may assess testimonial evaluation of a statute's social or economic wisdom, cannot override the legislators' authority to legislate. So long as a law bears a reasonable relation to the state's legitimate purpose, it survives a due process claim, regardless of its ultimate efficacy. *Exxon Corp.*, at 124-25, 98 S.Ct. at 2213.

Plaintiffs also invoke the Equal Protection Clause. However, there is no basis for facial equal protection attack. The ordinance creates no classification at all, applying equally to all retail establishments. *Mid-Atlantic Accessories Trade Association v. State of Maryland, supra*, at 849-850.

While plaintiffs refer to the First Amendment, this case presents no basis for considering it. Unlike the local ordinances in *Parma, supra*, the Westchester County ordinance contains no express prohibition against advertising. Accordingly, the issues respecting proper limitations upon commercial speech confronting the *Parma* court, at 936-937, do not rise in the case at bar. Sufficient basis for invalidating the ordinance is found in the due process concept of vagueness; the trial record, which did not explore the free speech issue at all, neither requires nor supports a treatment of the concept.[11]

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[11] Cf. *Smith v. Goguen*, 415 U.S. 566, 583 n.32, 94 S.Ct. 1242, 1252, 39 L.Ed.2d 605 (1974):

"We have not addressed Goguen's First Amendment argu-

(footnote continued on following page)

Appendix B

Plaintiffs' remaining constitutional theories have been uniformly rejected by the courts in drug paraphernalia cases that have considered them, *Mid-Atlantic Accessories Trade Association v. State of Maryland, supra,* at 849-850; *Nova Records, Inc. v. Sendak,* No. IP80-431-C, 504 F.Supp. 938, at 943-944 (S.D.Ind., December 9, 1980), at slip. op. 8-9, and require no further discussion.

CONCLUSION

Article IX of the County of Westchester Consumer Protection Code, titled "Sale and Display of Drug Accessories" and comprising sections 863.221-863.226, is hereby declared impermissibly vague, and consequently in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Its enforcement will be permanently enjoined.

Settle order and judgment on five (5) days' notice.

(footnote continued from preceding page)

ments because, having found the challenged statutory language void for vagueness, there is no need to decide additional issues. Moreover, the skeletal record in this case, see n.1, supra, affords a poor opportunity for the careful consideration merited by the importance of the First Amendment issues Goguen has raised."

APPENDIX C, Entry of Judgment.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1496—September Term, 1980
Argued: June 3, 1981 Decided: August 18, 1981
Docket No. 81-7211

81-7211

ROBERT BRACHE and EDNA FRANZA,

Plaintiffs-Appellees,

v.

COUNTY OF WESTCHESTER, ALFRED DELBELLO, KENNETH HALE, SAMUEL S. YASGUR, THOMAS DELANEY, JEROME HERLIHY and TERRENCE SHAMES,

Defendants,

COUNTY OF WESTCHESTER, ALFRED DELBELLO, KENNETH HALE, SAMUEL S. YASGUR, and THOMAS DELANEY,

Defendants-Appellants.

Before: KAUFMAN and NEWMAN, *Circuit Judges*, and GAGLIARDI, *District Judge*.

Appeal from a judgment of the District Court for the Southern District of New York (Charles S. Haight, Jr., Judge), declaring a Westchester County ordinance prohibiting the sale of drug paraphernalia unconstitutionally vague and enjoining its enforcement. 507 F. Supp. 566.

Reversed and remanded.

STAMPED: FILED
August 18, 1981
A. Daniel Fusaro
Clerk

APPENDIX D, Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 16th day of October, one thousand nine hundred and eighty-one.

No. 81-7211

ROBERT BRACHE and EDNA FRANZA,

Plaintiffs-Appellees,

v.

COUNTY OF WESTCHESTER, ALFRED DELBELLO, KENNETH HALE, SAMUEL S. YASGUR, THOMAS DELANEY, JEROME HERLIHY and TERRENCE SHAMES,

Defendants,

COUNTY OF WESTCHESTER, ALFRED DELBELLO, KENNETH HALE, SAMUEL S. YASGUR, and THOMAS DELANEY,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellees, Robert Brache and Edna Franza,

Upon consideration by the panel that heard the appeal, it is

Appendix D

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO
A. Daniel Fusaro
Clerk
by FRANCIS X. GINDHART
Chief Deputy Clerk

STAMPED: FILED
October 16, 1981
A. Daniel Fusaro
Clerk

APPENDIX E, Order Staying Mandate Pending Petition for Writ of Certiorari.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

81-7211

ROBERT BRACHE and EDNA FRANZA,

Plaintiffs-Appellees,

v.

COUNTY OF WESTCHESTER, ALFRED DELBELLO, KENNETH HALE, SAMUEL S. YASGUR, THOMAS DELANEY, JEROME HERLIHY and TERRENCE SHAMES,

Defendants,

COUNTY OF WESTCHESTER, ALFRED DELBELLO, KENNETH HALE, SAMUEL S. YASGUR, and THOMAS DELANEY,

Defendants-Appellants.

It is hereby ordered that the motion requesting a stay of mandate pending application for Writ of Certiorari be and it is hereby granted.

Signed

IRVING R. KAUFMAN (per J.O.N.)
JON O. NEWMAN
LEE P. GAGLIARDI (per J.O.N.)

Dated: 10/26/81

APPENDIX F, The Ordinance.

The Ordinance

The Westchester County ordinance provides as follows:
"ARTICLE IX— SALE AND DISPLAY OF DRUG ACCESSORIES
"Section 863.221. LEGISLATIVE FINDINGS. It is hereby declared and found that the sale of items used to aid the storage, use, concealment and test the strength or purity of illegal drugs is a widespread and growing practice which is contrary to the public interest. Many parent and teacher organizations, such as the New York State Congress of Parents and Teachers, as well as Local P.T.A. groups have recognized the problem and have encouraged and endorsed legislation that would prohibit the sale of drug-related paraphernalia. Therefore, public safety, health, welfare and morals would be best served by discontinuing the sale of such items.

"Section 863.222. Definitions. a) The term drug paraphernalia' means all equipment products and materials of any kind which are used, intended for use, or desinged [sic] for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of the laws of the State of New York. It includes, but is not limited to:

"1. Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

"2. Kits used, intended for use, or designed for use in manufacturing, componding, converting, producing, processing, or preparing controlled substances;

"3. Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;

"4. Testing equipment used, intended for use, or designed for use in identifying or in analyzing the strength, effectiveness or purity of controlled substances;

"5. Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

"6. Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;

"7. Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining marijuana;

"8. Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;

"9. Capsules, balloons, envelopes and other containers used, intended for use or designed for use in packaging small quantities of controlled substances;

"10. Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

"11. Hypodermic syringes, needles and other objects used, intended for use or designed for use in parenterally injected controlled substances in the human body;

"12. Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introduced [sic] marijuana, cocaine, hashish, or hashish oil into the human body, such as:

Appendix F

"a. Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes; with or without screens, permanent screens, hashish heads, or punctured metal bowls;

"b. Water pipes;

"c. Carburetion tubes and devices;

"d. Smoking and carburetion masks;

"e. Roach clips, meaning objects used to hold burning material such as marajuana [sic] cigarette, that has become too small or too short to be held in the hand;

"f. Minature cocaine spoons and cocaine vials;

"g. Chamber pipes;

"h. Carburetor pipes;

"i. Electric pipes;

"j. Air-driven pipes;

"k. Chillums;

"l. Bongs;

"m. Ice pipes or chillers;

"13. 'Cocaine Spoon': A spoon with a bowl so small that the primary use for which it is reasonably adopted or designed is to hold or administer cocaine, and which is so small as to be unsuited for the typical, lawful uses of a spoon. A cocaine spoon may or may not be labeled as a "cocaine" spoon or 'coke' spoon.

"14. Marijuana or Hashish Pipe': A pipe characterized by a bowl which is so small that the primary use for which it is reasonably adopted or designed is the smoking of marijuana or hashish, rather than lawful smoking tobacco, and which may or may not be equipped with a screen.

Appendix F

"In determining whether an object is drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

"1. Statements by an owner or by anyone in control of the object concerning its use;

"2. Prior convictions, if any, of an owner, or of anyone in control of the object, under any State or Federal law relating to any controlled substance;

"3. The proximity of the object ,in time and space, to a direct violation of this Act;

"4. The proximity of the object to controlled substances;

"5. The existence of any residue of controlled substances on the object;

"6. Direct or circumstantial [sic] evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons who he knows, or should reasonably know, intend to use the object to facilitate violation of this Act; the innocence of an owner, or of anyone in control of the object as the direct violation of this Act should not prevent a finding that the object is intended for use, or designed for use as drug paraphernalia;

"7. Instructions ,oral or written, provided with the object concerning its use;

"8. Descriptive materials accompanying the object which explain or depict its use;

"9. National and local advertising concerning its use;

"10. The manner in which the object is displayed for sale;

"11. Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

"12. Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

"13. The existence and scope of legitimate uses for the object in the community;

"14. Expert testimony concerning its use.

"Section 863.223. SALE AND DISPLAY OF DRUG ACCESSORIES. It shall be a violation of this code for any merchant or other person to knowingly sell, offer for sale, or display any cocaine spoon, marijuana pipe, hashish pipe, or any other drug-related paraphernalia.

"Section 863.224. PENALTIES. Notwithstanding any provision in the Westchester County Charter, the Westchester County Administrative Code or any other local laws, a person who violates any provision of this article is guilty of a misdemeanor.

"Section 863.225. SEVERABILITY. If any clause, sentence, paragraph or part of this Local Law shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy and in which such judgment [sic] shall have been rendered.

"Section 863.226. EFFECTIVE DATE. This Local Law shall take effect on the sixtieth day after it shall have become a law."

Opposition

Office - Supreme Court, U
FILED
JUN 18 1982
ALEXANDER L. STEVAS
CLERK

NO. 81-998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT BRACHE and EDNA FRANZA,
Petitioners,

against

COUNTY OF WESTCHESTER, et al.,
Respondents.

BRIEF OF RESPONDENTS COUNTY OF WESTCHESTER, DELBELLO, HALE, YASGUR AND DELANEY IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether prior to enforcement of a local ordinance, a federal court should exercise its equitable jurisdiction to permanently enjoin enforcement on the ground that it is void for vagueness when the plaintiffs, after attempting to deceive the Court by means of false affidavits and testimony, ultimately admit that they knowingly engage in certain activities which are clearly and validly prohibited by the ordinance.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-998

ROBERT BRACHE and EDNA FRANZA,

Petitioners,

against

COUNTY OF WESTCHESTER, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENTS COUNTY OF WESTCHESTER, DEL BELLO, HALE, YASGUR AND DELANEY IN OPPOSITION TO PETITION FOR CERTIORARI

Gerald B. Lefcourt, on behalf of Petitioners Robert Brache and Edna Franza, seeks a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, entered August 18, 1981, which reversed a judgment of the United States District Court, Southern District of New York, entered February 19, 1981.

OPINIONS BELOW

The United States District Court for the Southern District of New York held that Article IX of the Westchester County Consumers Protection Code entitled "Sale and Display of Drug Accessories" ("The Ordiance") was vague on its face, in violation of the Due Process Clause of the Fourteenth Amendment and permanently enjoined its enforcement. The opinion of the District Court is reported at 507 F. Supp 566 and is annexed to the Petition for Certiorari as Appendix B. In a judgment entered August 18, 1981, the United States Court of Appeals for the Second Circuit reversed the judgment of the District Court and directed that judgment be entered declaring the Ordinance valid on its face and valid as

applied to Petitioners' sale of items used only for preparing, testing or ingesting drugs and dismissed for lack of standing the Petitioners' challenge to the Ordinance's application to their sale of other items. The opinion of the Court of Appeals is reported at 658 F. 2d 47 and is annexed to the Petition for Certiorari as Appendix A.

JURISDICTION

The jurisdiction of this Court is predicated upon 28 U.S.C.§1254(1).

STATEMENT OF THE CASE

Pre-trial Proceedings

Plaintiffs Robert Brache and Edna Franza, owners of "boutiques" in Westchester County, New York, commenced

the instant action on July 24, 1980, challenging the constitionality of Local Law 5-1980, an amendment of Westchester County's Consumer Protection Code, which added thereto a new Article IX entitled "Sale and Display of Drug Accessories"* ("The Ordinance").

Petitioners applied to the United States District Court for the Southern District of New York for equitable relief in the form of a preliminary and permanent injunction of enforcement of the Ordinance and a declaration that the Ordinance, which was to become effective July 28, 1980, was unconstitutional in several respects. On July 24, 1980, the District Court

*The full text of the Ordinance is set forth as Appendix F of the Petition for Certiorari.

entered a temporary restraining order, which was continued upon consent of the Respondents, pending that Court's decision on the merits of the case.* The hearing on Petitioners' request for a preliminary injunction was consolidated with the trial of the action on the merits, which commenced on September 8, 1980 before Judge Charles S. Haight, Jr. Petitioners' prime contention at trial was that the Ordinance is "void for vagueness."

---

*To date Respondents have been and continue to be enjoined from enforcing the Ordinance. After the United States Court of Appeals for the Second Circuit issued its opinion on August 18, 1981, Petitioners sought rehearing en banc. When rehearing en banc was denied on October 22, 1981, Petitioners obtained a stay of issuance of the Court's mandate pending their application for Certiorari. Petitioners thereafter filed the Petition for Certiorari within 30 days and pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, that stay is continued pending disposition of the Petition herein.

At the time of their initial application to the District Court for temporary and later preliminary equitable relief, Petitioners submitted misleading affidavits in which they vigorously professed ignorance about, and inability to understand, the meaning of the Ordinance. Petitioner Brache falsely claimed, inter alia, that "[he] frankly has no idea what [he] can lawfully sell and what [he] can't". Affidavit of Robert Brache dated July 23, 1980 in Support of Application for Preliminary Injunction. Petitioner Franza employed the same deceitful strategy:

> ...I have read the Ordinance but I cannot determine what is prohibited and what is allowed under its provisions. There are so many uses for these items and their design is so ambiguous that I am unable to figure which items might qualify as drug paraphernalia.

Affidavit of Edna Franza dated July 23, 1980 in Support of Application for Preliminary Injunction.

The Evidence at Trial

Petitioners took similar positions during the course of their direct testimony at trial. At the completion of the trial, however, after cross-examination and the admission of approximately one hundred fifty physical and documentary exhibits, Petitioners' claims of ignorance with regard to the meaning of the Westchester County Ordinance were generally exposed as nothing more than a calculated sham.

Petitioner Brache reluctantly conceded knowledge that numerous items sold in his "smoke shop" are only or

"basically" used with controlled substances,* and was forced to admit that as to certain items, among them the marijuana test kit, the marygin and mannitol, the Ordinance left no doubt that they were prohibited. Franza, too, hesitatingly agreed that there was no lawful "alternative" use for the marygin

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*Marijuana test kits (Tr 116, Defendants' Exhibit "A"), grooved mirrors used to measure and ingest cocaine (Tr 154, Plaintiffs' Exhibit "G-3"), Y-shaped inhaling tubes for cocaine ingestion (Tr 167, Plaintiffs' Exhibit "J"), marygins for marijuana sifting (Tr 184, Defendants' Exhibit "B"), free-base kits used to separate cocaine from impurities (Tr 192, Defendants' Exhibit "O"), the twenty bong hitter for marijuana and hashish smoking (Tr 245, Defendants' Exhibit "D"), bongs (Tr 248, Plaintiffs' Exhibit "R", Defendants' Exhibit "N"), Deering Preparation Kits for cocaine purification (Tr 108, 110, 246), and mannitol, a cocaine dilutant (Tr 113, Defendants' Exhibit "C").

(Tr 341), the marijuana test kit (Tr 341), and the free-base kit (Tr 341).

The Decision of the District Court

In rejecting Plaintiffs' disingenuous cries of ignorance with respect to their understanding of the Ordinance the District Court wrote:

* * *

> Plaintiffs testified at trial, in essence, that they did not know where these items came from, what they were for, or to what purpose the purchasers would put them; their only purpose and concern was selling items, any items, for profit. I reject these apologias as unworthy of belief.
>
> * * *
>
> I find that both plaintiffs were knowingly selling certain items which unquestionably constituted "drug paraphernalia" to drug users; and that the Westchester Ordinance would put them on notice, in respect of at least those items, that this was illegal.

567 F. Supp. 566, 573.

Despite this finding, the District Court held that the Ordinance should not be considered "as applied" to Plaintiffs since

> ...in the absence of a formal, factual development as to the actual practices of enforcement, at least in respect of the litigants, an insufficient basis exists for adjudicating validity as applied. Hejira Corp. v. MacFarlane, Crim. Action No. 80-F-824 (D. Colo., Sept. 15, 1980) (oral opinion at Tr. 9).

Id.

Rather, the District Court found that

> ... the evidence does not foreclose plaintiffs from professing uncertainty as to the full range of commercial activity that the ordinance

> forbids. That issue arises from the face of the ordinance, and facial analysis is appropriate.*

(Id.) at 573, 574.

The Decision of the Court of Appeals

The United States Court of Appeals for the Second Circuit reversed the judgment of the District Court and remanded the cause with directions to enter a judgment (1) declaring the ordinance valid on its face and valid as applied to the Petitioners' sale of items

---

*The District Court went on to hold that despite the plain scienter requirement in the County Ordinance, which states that a merchant or other person is in violaton thereof only if he knowingly sells, offers for sale, or displays any cocaine spoon, marijuana pipe, hashish pipe, or any other drug-related paraphernalia, "proof of knowledge of actual use is essential to the constitutional validity of such laws" Id. at 578 and that the absence of such a requirement in the County ordinance renders it "void for vagueness."

used only for preparing, testing or ingesting drugs and (2) dismissing for lack of standing the Petitioners' challenge to the Ordinance's application to their sale of other items.

In so ruling, the Court noted that Petitioners' facial attack on the Ordinance "failed when the District Court found that the ordinance has a core meaning that gives fair notice of its application to the sale of single-use items". 658 F. 2d 47,51. The Court of Appeals went on to state that once the District Court properly rejected a facial challenge to the Ordinance because the Ordinance would be valid as applied to one activity in which Petitioners were currently engaged the District Court was

required, under the ruling in U.S. v. Raines, 362 U.S. 17, 80 S. Ct. 519 (1948) to decline to adjudicate their claim that the Ordinance would be invalid if applied to a second activity in which they were currently engaged (the sale of so-called "multi-use" items). The Court noted that its conclusion was based primarily on the considerations underlying the Raines rule and that those considerations include

> the undesirability of unnecessary, premature, or unduly broad pronouncements on constitutional issues, the intrusiveness of a court's considering all the situations in which a law could possibly be applied, and the possibility of a limiting construction being placed on the law in the event an application of questionable validity was concretely presented. 362 U.S. at 21-22. These considerations apply fully when litigants, like the plaintiffs, who engage in some conduct that could validly be

> prosecuted under a statute, challenge the statute's application to other conduct in which they are currently engaged.

Id. at 52. The Court finally wrote that its conclusion was reinforced by basic principles of equity and comity as set forth in prior opinions of this Court:

> It would be a singularly inappropriate use of a court's equitable jurisdiction to grant relief to plaintiffs currently selling single-use items to which the challenged ordinance may validly be applied, especially when the plaintiffs have shown no willingness to remove those items from their shelves.

Id. at 54.* The Court of Appeals held that

*citing O'Shea v. Littleton, 414 U.S. 452, 499-504 (1974); Younger v. Harris, 401 U.S. 37, 43-46, 50-51 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Dombrowski v. Pfister, 380 U.S. 479, 491-92 (1965); and Douglas v. City of Jeannette, 319 U.S. 157 (1943).

once the District Court determined that the Ordinance could validly be applied to Petitioners' sale of certain items, the pre-enforcement consideration of Petitioners' claim based on the Ordinance's possible application to their sale of other items "constituted an unwarranted interference with good faith local law enforcement." Id.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

A. The Decision of the Court of Appeals is Consistent with Prior Decisions of this Court

Despite false assertions in affidavits and false direct testimony at trial that Petitioners could not understand the Westchester County Drug-Paraphernalia Ordinance, and that they did not know what

they could sell or not pursuant to its terms the District Court found (and the Court of Appeals agreed) that the Petitioners in this case were knowingly selling items which were unquestionably drug paraphernalia and that the Ordinance which they challenge on vagueness grounds clearly put these Petitioners on notice that the sale of those items is prohibited. In the context of those facts, the Court of Appeals properly applied the law of this Court in denying Petitioners' pre-enforcement request for equitable relief.

It is well settled that "federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework." Dombrowski v. Pfister, 380 U.S. 479, 484 (1965). Such interference is

the exception rather than the rule. As the Court of Appeals quite reasonably opined, no exception to that rule should be made in this case prior to enforcement of the Ordinance when Petitioners who are selling items clearly and validly prohibited by the Ordinance have shown no willingness to remove those items from their shelves. See O'Shea v. Littleton, 414 U.S. 452 (1974); Boyle v. Landry, 401 U.S. 77 (1971).

B. The Petition for Certiorari is Premature

It would be premature for this Court to exercise its discretion to grant Certiorari prior to any attempt to enforce the Ordinance. The denial of the instant Petition does not preclude these Petitioners, or others, from seeking review of the Ordinance if, after enforcement,

there are viable claims that the Ordinance is in fact "void for vagueness". In view of Petitioners' ongoing activities, however, granting certiorari at this time is unwarranted. See O'Shea v. Littleton, supra, Laird v. Tatum, 408 U.S. 1 (1972); Boyle v. Landry, supra, Golden v. Zwickler, 394 U.S. 103 (1969). As this Court has previously stated, there will be time enough to consider a possible vagueness claim when "raised by someone whom it concerns." United States v. Wurzbach, 280 U.S. 394,399(1930).

In short, under the circumstances here,

> [p]assing upon the possible significance of manifest provisions of a broader statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical issue.

Watson v. Burk, 313 U.S. 387, 402 (1930). This the Supreme Court has previously declined to do.

C. There is No Conflict in the Law of the Circuits Which Requires Resolution

Finally, there is no need for this Court to exercise its discretion to grant certiorari in this case to "unify the law of the Circuit Courts of Appeal," as suggested by Petitioners. Petition, p. 13. As Petitioners note in the paragraph immediately preceeding that suggestion, "[t]he standing issue" is "unique to this case" Id. Indeed it is unique to this case because the issue was not similarly raised or addressed in any of the other drug paraphernalia cases determined by the Circuit Courts of

Appeal. It is unique also because no drug paraphernalia case determined by the other Circuit Courts has the factual basis in its record to support the findings made here concerning Petitioners' activities, knowledge, and deceitful strategy.

Thus, the statement in the petition that

> the opinion below is contrary to the conclusions reached by the five other Circuit Courts of Appeal that have recently faced the question in regard to suits challenging "drug paraphernalia" law.

Petition, p. 13, is completely incorrect. No such conflict exists. The decision of the Second Circuit was based upon the peculiar facts of this case alone. The decision is sui generis and would have no application to any other drug paraphernalia case which might ultimately be reviewed by the Supreme Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SAMUEL S. YASGUR
Westchester County Attorney
Attorney for Respondents

JONATHAN LOVETT
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JANE BILUS GOULD
Senior Assistant County Attorney
Of Counsel

January 15, 1982